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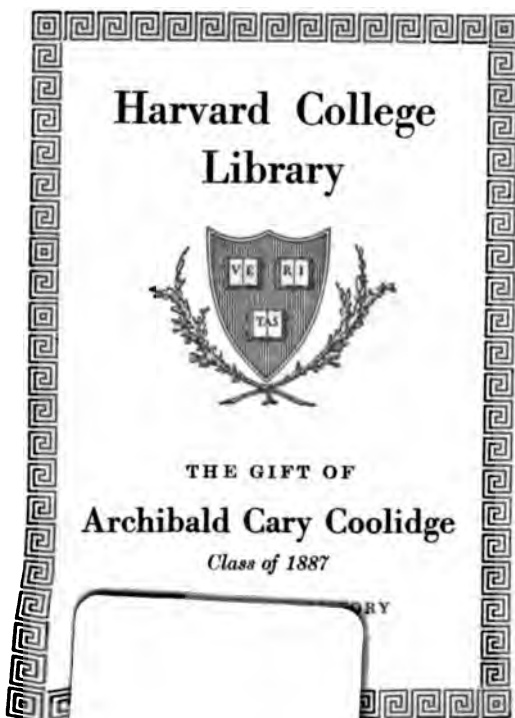
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**A DIGEST  
OF  
INTERNATIONAL LAW**

**AS EMBODIED IN**

**DIPLOMATIC DISCUSSIONS, TREATIES AND  
OTHER INTERNATIONAL AGREEMENTS, INTERNATIONAL  
AWARDS, THE DECISIONS OF MUNICIPAL COURTS, AND  
THE WRITINGS OF JURISTS,**

**AND ESPECIALLY IN**

**DOCUMENTS, PUBLISHED AND UNPUBLISHED,  
ISSUED BY PRESIDENTS AND SECRETARIES OF STATE OF  
THE UNITED STATES,  
THE OPINIONS OF THE ATTORNEYS-GENERAL, AND THE  
DECISIONS OF COURTS, FEDERAL  
AND STATE.**

**BY**

**JOHN BASSETT MOORE, LL. D.,**

**Hamilton Fish Professor of International Law and Diplomacy, Columbia University,  
New York; Associate of the Institute of International Law; Sometime  
Third Assistant Secretary of State and Assistant Secre-  
tary of State of the United States;  
Author of a Treatise on Extradition and Interstate Rendition, of American Notes on  
the Conflict of Laws, of a History and Digest of International Arbitra-  
tions, of an Exposition of the Spirit and Achievements  
of American Diplomacy, etc.**

**IN EIGHT VOLUMES  
(THE EIGHTH BEING INDEXICAL).**

**VOLUME I.**

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## P R E F A C E .

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By the act of Congress of February 20, 1897, a provision was made for "revising, reindexing, and otherwise completing and perfecting by the aid of such documents as may be useful, the second edition of the Digest of the International Law of the United States." The work thus referred to was the "Digest of the International Law of the United States," edited by Francis Wharton, LL.D., which was published in three volumes in 1886, and of which a second issue, embracing about 160 pages of new matter, added to the third volume, was made in 1887. It was my fortune to have been to some extent connected, in a contributory capacity, with the preparation of that work. In a pamphlet submitted to Congress, before the printing of his work was authorized, Doctor Wharton was so good as to say: "I am indebted to John B. Moore, esq., of the Department of State, to whose great aid in other respects I am glad to acknowledge my obligations, for a compilation of the rulings of commissions established by the United States, in connection with other powers, for the settlement of points in international dispute." In the preface to his Digest, the learned editor repeated this acknowledgment, but stated that the "digest of the rulings of the international commissions" would "occupy a separate volume." It proved, indeed, to be a longer and more laborious task than the work of which it was originally expected to form a part, and eventually grew into the "History and Digest of International Arbitrations," in six volumes, which was published in 1898, by authority of Congress, as an independent work. My actual contribution to the "Digest of the International Law of the United States" embraced the decisions of the courts, the opinions of the Attorneys-General, the essential framework of the chapter on the fisheries, and certain minor matters.

Of the original conception of the plan of his Digest, and of the order and arrangement, the entire merit belongs to Doctor Wharton. He was an incessant and heroic worker, and the preparation of his Digest in the space of two years was, even with such secondary aid as he obtained from various other persons, a remarkable feat. But certain results were inevitable. In the performance of such a task time is an essential ingredient. Important records were left unexplored, or were only cursorily inspected; the significance of docu-

ments was not always caught or correctly conveyed; and as the references to manuscripts were, except for the apparent dates, wholly indefinite, it was often impossible afterwards to trace and verify them.

Personal experience not only in the use of the International Law Digest, but also in the prosecution of researches for my History and Digest of International Arbitrations, had exceptionally familiarized me with these conditions, when in June, 1897, I undertook the work authorized by the act of the preceding February. But, as I proceeded with the task, I became more and more firmly convinced that, if it was to be performed properly, it must be carried out on a scale much larger than had apparently been contemplated. Not only was it evident that much of the new material that I was accumulating could not be classified under the titles of the previous work, but it was also found on investigation that in many instances the disposition of the old material should be changed. In these circumstances, the results of a mere revision must have been both inadequate and incongruous.

A revision, with supplementary sections, could hardly have been more satisfactory. A third course was to adopt a new and independent plan, comprehending the entire subject; and this solution of the problem, although the most onerous, was believed to be the only one that was compatible with scientific principles.

In the execution of this design two points of capital importance have ever been borne in mind. One is that mere extracts from state papers or judicial decisions can not be safely relied on as guides to the law. They may indeed be positively misleading. Especially is this true of state papers, in which arguments are often contentiously put forth which by no means represent the eventual view of the government in whose behalf they were employed. Instead, therefore, of merely quoting extracts from particular documents, it has been my aim to give the history of the cases in which they were issued, and, by showing what was finally done, to disclose the opinion that in the end prevailed. In this way, too, the views of both sides are presented. It may be superfluous to say that there is, strictly speaking, no such thing as "the international law of the United States," or the "international law" of any other particular country. The phrase is itself a misnomer, and conveys an implication which the Government of the United States has always been the first to repel, for it has ever been the position of the United States that international law is a body of rules common to all civilized nations, equally binding upon all and impartially governing their mutual intercourse. It will also be observed that, while the work bears the name and the character of a digest, it also contains much that is of an expository nature, in a form suitable to a treatise.

The other point to which I have endeavored specially to attend is,

in dealing with manuscript records, to avoid giving brief glosses which convey no intimation of the question under consideration, but to follow and, wherever practicable, quote the text, and to give, besides, enough of the facts to render the application apparent. This I conceive to be of the essence of a digest, especially of unpublished papers which the reader can not himself consult. It will also be observed that I have given volume and page of manuscript citations so that the originals can immediately and certainly be reached. The documents were first found, read, and marked by myself personally, the figures of reference were then taken by my copyists, and these figures have all been verified and omissions supplied in the proofs.

Of the present work, the matter in Wharton's Digest, although it is in substance entirely preserved, and where textually retained is usually quoted, forms only a small part. Quotations from printed sources, which are accessible to the general reader, have usually been abridged and worked into the complete statement of the case, which it has been my object to furnish.

But in no instance, it is believed, has a quotation from manuscripts been curtailed. On the contrary it has been my rule to enlarge the quotations from such sources, with a view by this and other means to increase their scientific value. The quantity of the material dealt with, from all sources, has been very great. Owing to its heavy accumulation and the necessity of prosecuting the work of analysis, classification, and digesting, I closed the systematic and minute gleaning of the manuscripts on July 1, 1901, down to which date I had carried it, beginning with the earliest records of the Department of State. Since that date I have drawn on the manuscripts only in the treatment of special questions or events of exceptional importance. The exploration of printed sources has been steadily carried on up to the time of printing. The total mass of the matter was much augmented by the great international transactions that have taken place since the beginning of the year 1898. In my fourth chapter, in particular, on the acquisition and loss of sovereignty, may be seen some of the contributions resulting from the conflict with Spain. I may also refer to the sections on guano islands, in the same chapter,<sup>a</sup> for an illustration of the minute care which the preparation of the work, on the plan heretofore outlined, has often entailed. Even now, after the lapse of nearly nine years (one of which, however, was almost wholly given to the public service), I could scarcely have brought it to completion, but for the assistance derived from my previous labors on the History and Digest of International Arbitrations.

I desire to make acknowledgment of the energetic and efficient supervision by Mr. James T. DuBois of the proof reading of the five

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<sup>a</sup> §§112-115.

last volumes of the text, as well as of the exact and intelligent care bestowed by Messrs. Henry B. Armes, Samuel B. Crandall, and Richard W. Flournoy, jr., all of the Department of State, on the comparison of proofs and the verification of references.

To Mr. Dudley Odell McGovney, at present fellow in international law in Columbia University, I wish to accord the credit for the index. It will, together with the table of cases and the list of documents cited, occupy a separate volume; and I doubt not that its great merits, including its fullness and orderly arrangement, will be generally recognized.

I wish also to express my appreciation of the helpfulness of my secretary, Mr. Jacob H. Goetz, now a member of the New York bar, who, besides rendering stenographic and other aid, has prepared the table of cases and the list of documents cited.

After twenty years' experience with the Government Printing Office, I am glad to testify to the uniform courtesy, promptitude, and efficiency of the officials with whom my business has been conducted.

JOHN B. MOORE.

NEW YORK, *May 21, 1906.*



# TABLE OF PRESIDENTS AND SECRETARIES OF STATE.

Presidents.	Secretaries of State.
George Washington, Apr. 30, 1789, to Mar. 3, 1797.	Thomas Jefferson, commissioned Sept. 26, 1789; entered on duties Mar. 22, 1790; served till Dec. 31, 1793. Edmund Randolph, Jan. 2, 1794, to Aug. 20, 1795. Timothy Pickering, Dec. 10, 1795, ———
John Adams, Mar. 4, 1797, to Mar. 3, 1801.	Timothy Pickering (continued) to May 12, 1800.
Thomas Jefferson, Mar. 4, 1801, to Mar. 3, 1809.	John Marshall, May 13, 1800, to Mar. 4, 1801. James Madison, Mar. 5, 1801, to Mar. 3, 1809.
James Madison, Mar. 4, 1809, to Mar. 3, 1817.	Robert Smith, Mar. 6, 1809, to Apr. 1, 1811.
James Monroe, Mar. 4, 1817, to Mar. 3, 1825.	James Monroe, Apr. 2, 1811, to Mar. 3, 1817. John Quincy Adams, commissioned Mar. 5, 1817; entered on duties Sept. 22, 1817; served to Mar. 3, 1825.
John Quincy Adams, Mar. 4, 1825, to Mar. 3, 1829.	Henry Clay, Mar. 7, 1825, to Mar. 3, 1829.
Andrew Jackson, Mar. 4, 1829, to Mar. 3, 1837.	Martin Van Buren, Mar. 6, 1829 to May 23, 1831. Edward Livingston, May 24, 1831, to May 29, 1833. Louis McLane, May 29, 1833, to June 30, 1834. John Forsyth, June 27, 1834, ——— John Forsyth (continued) to Mar. 3, 1841.
Martin Van Buren, Mar. 4, 1837, to Mar. 3, 1841.	Daniel Webster, Mar. 5, 1841, ———
William Henry Harrison, Mar. 4, 1841, to Apr. 4, 1841.	Daniel Webster (continued) to May 8, 1843.
John Tyler, Apr. 6, 1841, to Mar. 3, 1845.	Abel P. Upshur, July 24, 1843, to Feb. 28, 1844. John C. Calhoun, Mar. 6, 1844, to Mar. 10, 1845.
James K. Polk, Mar. 4, 1845, to Mar. 3, 1849.	James Buchanan, commissioned Mar. 6, 1845; entered on duties Mar. 10, 1845; served to Mar. 7, 1849.
Zachary Taylor, Mar. 5, 1849, to July 9, 1850.	John M. Clayton, Mar. 7, 1849, ———
Millard Fillmore, July 10, 1850, to Mar. 3, 1853.	John M. Clayton (continued) to July 22, 1850. Daniel Webster, July 22, 1850, to Oct. 24, 1852.
Franklin Pierce, Mar. 4, 1853, to Mar. 3, 1857.	Edward Everett, Nov. 6, 1852, to Mar. 3, 1853. William L. Marcy, Mar. 7, 1853, to Mar. 6, 1857.
James Buchanan, Mar. 4, 1857, to Mar. 3, 1861.	Lewis Cass, Mar. 6, 1857, to Dec. 14, 1860. Jeremiah S. Black, Dec. 17, 1860, to Mar. 6, 1861.
Abraham Lincoln, Mar. 4, 1861, to Apr. 15, 1865.	William H. Seward, Mar. 5, 1861, ———
Andrew Johnson, Apr. 15, 1865, to Mar. 3, 1869.	William H. Seward (continued) to Mar. 4, 1869.
Ulysses S. Grant, Mar. 4, 1869, to Mar. 3, 1877.	Elihu B. Washburne, Mar. 5, 1869, to Mar. 16, 1869. Hamilton Fish, commissioned Mar. 11, 1869; entered on duties Mar. 17, 1869; served to Mar. 12, 1877.
Rutherford B. Hayes, Mar. 5, 1877, to Mar. 3, 1881.	William M. Evarts, Mar. 12, 1877, to Mar. 7, 1881.
James A. Garfield, Mar. 4, 1881, to Sept. 19, 1881.	James G. Blaine, commissioned Mar. 5, 1881; entered on duties Mar. 7, 1881, ———
Chester A. Arthur, Sept. 20, 1881, to Mar. 3, 1885.	James G. Blaine (continued) to Dec. 19, 1881. Frederick T. Frelinghuysen, commissioned Dec. 12, 1881; entered on duties Dec. 19, 1881; served to Mar. 6, 1885.

*Table of Presidents and Secretaries of State—Continued.*

Presidents.	Secretaries of State.
Grover Cleveland, Mar. 4, 1885, to Mar. 3, 1889.	Thomas F. Bayard, Mar. 6, 1885, to Mar. 6, 1889.
Benjamin Harrison, Mar. 4, 1889, to Mar. 3, 1893.	James G. Blaine, Mar. 5, 1889, to June 4, 1892.
Grover Cleveland, Mar. 4, 1893, to Mar. 3, 1897.	John W. Foster, June 29, 1892, to Feb. 23, 1893.
William McKinley, Mar. 4, 1897, to Sept. 14, 1901.	Walter Q. Gresham, Mar. 6, 1893, to May 28, 1895.
	Richard Olney, June 8, 1895, to Mar. 5, 1897.
	John Sherman, Mar. 5, 1897, to Apr. 25, 1898.
	William R. Day, Apr. 26, 1898, to Sept. 16, 1898.
	John Hay, Sept. 20, 1898, ———.
Theodore Roosevelt, Sept. 14, 1901, ———.	John Hay (continued) to July 1, 1905.
	Elihu Root, July 7, 1905, ———.

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## CHAPTER I.

### INTERNATIONAL LAW.

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#### I. ITS ORIGIN AND OBLIGATION.

##### § 1.

There is no precise time at which it may be said that the body of rules which regulate, under the title of international law, the intercourse of nations, came into being. As a science it assumed a definite form in the sixteenth and seventeenth centuries, in the works of the great philosophical jurists, of whom Grotius is the most illustrious.<sup>a</sup> These works are distinguished by the blending of moral principles as discovered by reason and revelation with positive law and custom as found in the jurisprudence of nations and their practices. The first constituted what was called the law of nature (*jus naturæ*); the second, the law of nations (*jus gentium*). Hence the title of some of the treatises—the Law of Nature and of

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<sup>a</sup> His great work, *De Jure Belli ac Pacis*, was published in 1625. "He claims," says Whewell, "to be the first who had reduced International Law to the form of an art or science. Nor do I conceive that this claim goes beyond his due." (Grotius on the Rights of War and Peace: an abridged translation, editor's preface, X.) Professor Holland, referring to Albericus Gentilis's *De Jure Belli libri tres* (1598), states that these three books "supply the model and framework of the first and third books of Grotius," but adds: "I am by no means concerned to place Gentilis on a level with his undeniably greater follower." (Studies in Int. Law, 23.) See, also, Sir James Mackintosh, *A Discourse on the Study of the Law of Nature and Nations*; Westlake, *Int. Law*, 30-36; Walker, *History of the Law of Nations*, I., chap. iii.; Rivier, *Note sur la Littérature du Droit des Gens avant la Publication du Jus Belli ac Pacis de Grotius*, 1625.

Nations. Of the positive element of the new science the Roman civil law was the chief source, since it was the foundation of the jurisprudence of the countries of continental Europe, whose laws and practices were chiefly consulted.

It is thus apparent that from the beginning the science in question denoted something more than the positive legislation of independent states, and the term "international law," which has in recent times so generally superseded the earlier titles, serves to emphasize this fact. It denotes a body of obligations which is, in a sense, independent of and superior to such legislation. The Government of the United States has on various occasions announced the principle that international law, as a system, is binding upon nations, not merely as something to which they may be tacitly assumed to have agreed, but also as a fundamental condition of their admission to full and equal participation in the intercourse of civilized states.

Though on many subjects the rules of international law are clear and precise, yet, as often happens with municipal law, the rule applicable to a particular case may be uncertain and difficult of ascertainment. In such cases an appeal is made to the authority of writers; to the provisions of treaties disclosing a consensus of opinion; to the laws and decrees of individual states regulating international conduct; to the decisions of international tribunals, such as boards of arbitration; and to the judgments of prize courts, and of ordinary municipal courts, purporting to be declaratory of the law of nations.

"The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice; but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this."

Marshall, C. J., *Thirty Hogsheads of Sugar v. Boyle* (1815), 9 Cranch, 191, 198.

The intercourse of the United States with foreign nations, and the policy in regard to them, being placed by the Constitution in the hands

of the Federal Government, its decisions upon these subjects are, by a universally acknowledged principle of international law, obligatory upon every citizen of the Union.

*Kennett v. Chambers* (1852), 14 Howard, 38.

“Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which when generally accepted became of universal obligation. The Rhodian law is supposed to have been the earliest system of marine rules. It was a code for Rhodians only, but it soon became of general authority because accepted and assented to as a wise and desirable system by other maritime nations. The same may be said of the Amalphitan table, of the ordinances of the Hanseatic League and of part of the marine ordinances of Louis XIV. They all became the law of the sea, not on account of their origin, but by reason of their acceptance as such. And it is evident that unless general assent is efficacious to give sanction to international law, there never can be that growth and development of maritime rules which the constant changes in the instruments and necessities of navigation require. Changes in nautical rules have taken place. How have they been accomplished, if not by the concurrent assent, express or understood, of maritime nations? When, therefore, we find such rules of navigation as are mentioned in the British orders in council of January 9th, 1863, and in our act of Congress of 1864, accepted as obligatory rules by more than thirty of the principal commercial states of the world, including almost all which have any shipping on the Atlantic Ocean, we are constrained to regard them as in part, at least, and so far as relates to these vessels, the laws of the sea, and as having been the law at the time when the collision of which the libellants complain took place. This is not giving to the statutes of any nation extraterritorial effect. It is not treating them as general maritime laws, but it is recognition of the historical fact that by common consent of mankind these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice. Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations.”

*The Scotia* (1871), 14 Wall. 170, 187, Mr. Justice Strong delivering the opinion of the court. This case was one of a collision between an American and a British ship.

See also *The Scotland* (1881), 105 U. S. 24; *The New York* (1899), 175 U. S. 187.

“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and

no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators, who, by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their author concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Hilton v. Guyot*, 159 U. S. 113. 163, 164, 214, 215.

“Wheaton places among the principal sources of international law, ‘Text-writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent.’ As to these he forcibly observes: ‘Without wishing to exaggerate the importance of these writers, or to substitute in any case their authority for the principles of reason, it may be affirmed that they are generally impartial in their judgment. They are witness of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles.’ Wheaton’s *International Law* (8th ed.), § 15.

“Chancellor Kent says: ‘In the absence of higher and more authoritative sanctions, the ordinances of foreign states, the opinions of eminent statesmen, and the writings of distinguished jurists are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree the presumption will be very great in favor of the solidity of their maxims, and no civilized nation that does not arrogantly set all ordinary law and justice at defiance will venture to disregard the uniform sense of the established writers on international law.’ 1 Kent Com., 18.”

Gray, J., delivering the opinion of the court, *The Paquete Habana* (1900), 175 U. S. 700.

“The municipal laws of a country can not change the law of nations so as to bind the subjects of another nation.”

Nature and force of obligation.

Case of the *Resolution*, Federal court of appeals (1781), 2 Dallas, 1, 4. See also *Le Louis*, 2 Dodson’s Adm. 239.

Nations may, by their municipal law, facilitate or improve the execution of the law of nations by any means they shall think best, “provided the great universal law remains unaltered.”

McKean, C. J., in *Ross v. Rittenhouse*, supreme court of Pa. (1792), 2 Dallas, 160.

“When the United States declared their independence, they were bound to receive the law of nations in its modern state of purity and refinement.”

Wilson, J., in *Ware v. Hylton* (1796), 3 Dallas, 199, 281.

“The law of nations may be considered of three kinds, to wit, *general*, *conventional*, or *customary*. The *first* is *universal*, or established by the general consent of mankind, and binds *all nations*. The *second* is founded on *express* consent, and is not universal, and only binds those nations that have assented to it. The *third* is founded on *TACIT* consent, and is only obligatory on those nations who have adopted it.”

Chase, J., in *Ware v. Hylton* (1796), 3 Dallas, 199, 227.

“An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”

Marshall, C. J., *Murray v. Schooner Charming Betsey* (1804), 2 Cranch, 64, 118. See also *Talbot v. Seeman*, 1 Cranch, 1; *Little v. Barreme* (1804), 2 Cranch, 170.

“Undoubtedly no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the whole world. Like all the laws of nations it rests upon the consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world.”

*The Scotia* (1871), 14 Wall. 170, 187.

“Every nation, on being received, at her own request, into the circle of civilized governments, must understand that she not only attains rights of sovereignty and the dignity of national character, but that she binds herself also to the strict and faithful observance of all those principles, laws, and usages which have obtained currency among civilized states, and which have for their object the mitigation of the miseries of war.

“No community can be allowed to enjoy the benefit of national character in modern times without submitting to all the duties which that character imposes. A Christian people who exercise sovereign power, who make treaties, maintain diplomatic relations with other states, and who should yet refuse to conduct their military operations

according to the usages universally observed by such states, would present a character singularly inconsistent and anomalous."

Mr. Webster, Sec. of State, to Mr. Thompson, minister to Mexico, April 15, 1842, Webster's Works, VI. 437.

If a government "confesses itself unable or unwilling to conform to those international obligations which must exist between established governments of friendly states, it would thereby confess that it is not entitled to be regarded or recognized as a sovereign and independent power."

Mr. Evarts, Sec. of State, to Mr. Foster, August 2, 1877, MS. Instr., Mexico, XIX. 357.

A municipal decree, whether executive, legislative, or judicial, contravening the law of nations has no extraterritorial force.

Mr. Fish, Sec. of State, to Mr. Wing, April 19, 1871, MS. Inst. Ecuador, I. 270; Mr. Evarts, Sec. of State, to Mr. Brunetti, Oct. 23, 1878, MS. Notes to Spain, IX. 558; Mr. Bayard, Sec. of State, to Mr. McLane, June 23, 1886, MS. Instr., France, XXI. 330; Mr. Bayard, Sec. of State, to Mr. Connery, Nov. 7, 1887, For. Rel. 1887, p. 751; Moore, Report on Extraterritorial Crime, Government Printing Office, 1887, and For. Rel. 1887, pp. 757-840; Moore, International Arbitrations, III., chap. lviii. 3070-3160.

In 1888 the Congress of Ecuador passed a law declaring, among other things, that the nation was not responsible for losses and damages caused by the enemy, either in a civil or an international war, or by mobs, riots, or mutinies; nor for losses and damages caused by the Government in its military operations, or in the measures which it might adopt for the restoration of public order; nor for losses or damages consequent upon measures adopted by the Government toward natives or foreigners, involving their arrest, banishment, imprisonment, detention, or extradition, whenever the exigencies of public order or a compliance with treaties with neighboring nations should require such action; and that no person, whether native or foreign, should have any right of indemnity in such cases. The diplomatic corps at Quito protested against the act as "contrary to the law of nations." The Government of the United States, when advised of the provisions of the statute, pronounced them "generally and substantially subversive of the principles of international law by which, and not by domestic legislation, the ultimate liability of governments to one another must be determined;" and declared that "by such a declaration of rules for the guidance of her conduct in international relations Ecuador places herself outside of the pale of international intercourse."

Mr. Rives, Assist. Sec. of State, to Mr. McGarr, Oct. 24, 1888, For. Rel. 1888, Part 1, p. 490; Mr. Rives, Acting Sec. of State, to Mr. Walker, Oct. 23, 1888, For. Rel. 1888, Part 1, p. 492.



“The statesmen and jurists of the United States do not regard international law as having become binding on their country through the intervention of any legislature. They do not believe it to be of the nature of immemorial usage, ‘of which the memory of man runneth not to the contrary.’ They look upon its rules as a main part of the conditions on which a state is originally received into the family of civilized nations. This view, though not quite explicitly set forth, does not really differ from that entertained by the founders of international law, and it is practically that submitted to, and assumed to be a sufficiently solid basis for further inferences, by governments and lawyers of the civilized sovereign communities of our day. If they put it in another way it would probably be that the state which disclaims the authority of international law places herself outside the circle of civilized nations.”

Maine, *International Law*, 37–38. This interpretation by Sir Henry Maine of the position of the United States is strikingly sagacious, since it expresses that position in terms substantially the same as those employed by the Department of State in the case of Ecuador (*supra*), almost at the moment when his work was issuing from the press and naturally without knowledge of its contents.

Sir Henry Maine discusses, at pp. 38–45, *Queen v. Keyn*, often called the case of the *Franconia*, L. R. 2 Exch. Div. 63, a case which, though often referred to as denying the authority of international law, was decided “upon grounds of municipal and not of international law.” (Hall, *Int. Law*, 4th ed. 213, note.) See also, as to the origin and obligation of international law, Phillimore, *Int. Law*, 1st ed., preface, and 2d ed., I. 75–77; Black, *At.-Gen.* (1859), 9 Op. 358.

The law of nations is “to be tried by the test of usage. That which has received the assent of all must be the law of all.”

**Effect of usage.**

Marshall, C. J., *The Antelope* (1825), 10 Wheat. 66, 120–121.

Referring to the statement of Lord Stowell, in *The Young Jacob and Johanna*, 1 C. Rob. 20, that a certain custom which had been observed in former wars “was a rule of comity only, and not of legal decision,” the court said:

“Assuming the phrase ‘legal decision’ to have been there used in the sense in which courts are accustomed to use it, as equivalent to ‘judicial decision,’ it is true that, so far as appears, there had been no such decision on the point in England. The word ‘comity’ was apparently used by Lord Stowell as synonymous with courtesy or good will. *But the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law.* As was well said by Sir James Mackintosh, ‘In the present century a slow and silent but

very substantial mitigation has taken place in the practice of war, and in proportion as that mitigated practice has received the sanction of time it is raised from the rank of mere usage, and becomes a part of the law of nations.' Discourse on the <sup>2</sup>Law of Nations, 38; 1 Miscellaneous Works, 360."

Gray, J., delivering the opinion of the court, *The Paquete Habana* (1900), 175 U. S. 694, holding that coast-fishing vessels, engaged in catching and bringing in fresh fish, are exempt from capture as prize of war. The italics in the above passage are the editor's.

"As international law is a product of the special civilization of modern Europe, and forms a highly artificial system of **Presumption as to** which the principles can not be supposed to be understood or recognized by countries differently civilized, **assent.** such states only can be presumed to be subject to it as are inheritors of that civilization. They have lived, and are living, under law, and a positive act of withdrawal would be required to free them from its restraints. But states outside European civilization must formally enter into the circle of law-governed countries. They must do something with the acquiescence of the latter, or of some of them, which amounts to an acceptance of the law in its entirety beyond all possibility of misconstruction. It is not enough consequently that they shall enter into arrangements by treaty identical with arrangements made by law-governed powers, nor that they shall do acts, like sending and receiving permanent embassies, which are compatible with ignorance or rejection of law. \* \* \*

"When a new state comes into existence its position is regulated by like considerations. If by its origin it inherits European civilization the presumption is so high that it intends to conform to law that the first act purporting to be a state act which is done by it, unaccompanied by warning of intention not to conform, must be taken as indicating an intention to conform, and brings it consequently within the sphere of law. If, on the other hand, it falls by its origin into the class of states outside European civilization, it can, of course, only leave them by a formal act of the kind already mentioned.

"A tendency has shown itself of late to conduct relations with states which are outside the sphere of international law to a certain extent in accordance with its rules; and a tendency has also shown itself on the part of such states to expect that European countries shall behave in conformity with the standard which they have themselves set up. Thus China, after France had blockaded Formosa in 1884, communicated her expectation that England would prevent French ships from coaling in British ports. Tacitly, and by inference from a series of acts, states in the position of China may in the long run be brought within the realm of law; but it would be unfair and

impossible to assume, inferentially, acceptance of law as a whole from isolated acts or even from frequently repeated acts of a certain kind."

Hall, Int. Law, 4th ed., 42-44.

Formerly the states that were subject and those that were not subject to international law were respectively classed as Christian and non-Christian. By Art. VII. of the treaty of Paris of March 30, 1856, however, Turkey was expressly "admitted to participate in the advantages of the public law and system of concert of Europe." (Hertslet, Map of Europe by Treaty, II. 1254.)

By the new treaties which went into effect in July and August, 1899, "Japan's position as a fully independent sovereign power is assured." (President McKinley, Annual Message, Dec. 5, 1899.) Japan's admission into the "circle of law-governed countries" was preceded by various acts by which she recognized the obligations of international law. In August, 1870, during the war between France and Germany, she issued a declaration of neutrality. (For. Rel. 1870, 188.) In 1886 the Emperor formally adhered to the Geneva Convention. By an imperial decree of March 19, 1887, the rules of maritime law embodied in the Declaration of Paris of 1856 were declared to be in force in the empire. On August 21, 1894, during the war with China, a law was promulgated for the organization of a prize court which was established at Sasebo. This law was based chiefly on the British and German prize acts; and there was subsequently promulgated a prize act, founded on the works of Professor Holland and Sir Godfrey Lushington, the rules of the Institute of International Law of 1882, and the instructions of the French navy of 1870. In the work of adaptation, however, Japan made one salutary improvement; she abolished the interest of the individual captor in the prize. (See Ariga, *La Guerre sino-japonaise au point de vue du droit international*; Takahashi, *Cases on International Law during the Chino-Japanese War*; Siebold, *Japan's Accession to the Comity of Nations*.)

To Hall's statement that China, in 1884, expressed the expectation that England would prevent French ships from coaling in British ports, it is proper to add that the British Government recognized the belligerent rights of China as well as of France, and acknowledged toward both the obligations of neutrality, issuing to that end instructions for the enforcement of the foreign enlistment act. (Br. & For. State Papers, LXXVI. 1884-1885, 434.)

## II. PART OF THE LAW OF THE LAND.

### § 2.

The "privilege of foreign ministers and their domestic servants depends upon the law of nations. The act of parliament of 7 Anne, c. 12, is declaratory of it. All that is *new* in this act is the clause which gives a summary jurisdiction for the *punishment* of the *infractors* of this law. \* \* \* But the act was *not* occasioned by any doubt 'whether the *law of nations*, particularly the part relative to public ministers, was not *part of the law of England*,' and the infraction criminal, nor intended to vary an iota from it. I remember in a case before Lord Talbot, \* \* \* the matter

Judicial declarations.

was very elaborately argued at the bar, and a solemn, deliberate opinion given by the court. \* \* \* Lord Talbot declared a clear opinion, 'That the *law of nations*, in its *full* extent, was *part of the law of England*.' 'That the act of Parliament was *declaratory*;' \* \* \* 'that the *law of nations* was to be collected from the *practice* of different nations, and the authority of *writers*.' Accordingly he argued and determined from such instances and the authority of *Grotius*, *Barbeyrac*, *Binkershoeck*, *Wiquefort*, etc., there being no *English* writer of eminence upon the subject. I was counsel in this case, and have a full note of it. I remember, too, Lord *Hardwicke's* declaring his opinion to the same effect, and denying that Lord Chief Justice *Holt* ever had any doubt as to the law of nations being part of the law of *England*."

Lord Mansfield, *Triquet v. Bath* (1764), 3 Burrows, 1478.

To the same effect, *The Emperor of Austria v. Day and Kossuth* (1881), 2 Giffard, 628.

See Blackstone, Comm., B. IV., ch. 5, p. 67; Coxe, *Judicial Power and Unconstitutional Legislation*, generally.

The "law of nations" being "in its full extent" a "part of the law" of Pennsylvania, to be "collected from the *practice* of different nations and the *authority of writers*," a citizen of France was tried, convicted, and sentenced at common law for an assault on the secretary of legation of France in the French minister's dwelling, and an assault and battery on the same person in the streets.

*Republica v. De Longchamps*, court of oyer and terminer at Philadelphia (1784), 1 Dallas, 111.

The same principle is stated by Lincoln, At.-Gen. (1802), 5 Op., Appendix, 691.

"If it be the will of the Government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the Government will manifest that will by passing an act for the purpose. Till such an act be passed, the court is bound by the law of nations, which is a part of the law of the land."

Marshall, C. J., *The Nereide* (1815), 9 Cranch, 388, 423.

Opinions of statesmen. "The law of nations makes an integral part \* \* \* of the laws of the land."

Mr. Jefferson, Sec. of State, to Mr. Genet, French Minister, June 5, 1793, Wait's Am. St. Pap. I. 30; Am. State Papers, For. Rel. I. 150.

"A question may be raised—Does this customary law of nations, as established in Europe, bind the United States? An affirmative answer to this is warranted by conclusive reasons.

"1. The United States, when a member of the British Empire, were, in this capacity, a party to that law, and not having dissented from it,

when they became independent, they are to be considered as having continued a party to it. 2. The common law of England, which was and is in force in each of these States, adopts the law of nations, the positive equally with the natural, as a part of itself. 3. Ever since we have been an independent nation, we have appealed to and acted upon the *modern* law of nations as understood in Europe—various resolutions of Congress during our revolution, the correspondence of executive officers, the decisions of our courts of admiralty, all recognized this standard. 4. Executive and legislative acts, and the proceedings of our courts, under the present government, speak a similar language. The President's proclamation of neutrality, refers expressly to the *modern* law of nations, which must necessarily be understood as that prevailing in Europe, and acceded to by this country; and the general voice of our nation, together with the very arguments used against the treaty, accord in the same point. It is indubitable, that the customary law of European nations is as a part of the common law, and, by adoption, that of the United States."

Hamilton, Letters of Camillus, No. 20, Lodge's Hamilton, V. 89; Hamilton's ed., VII. 349.

"Offences committed in the territorial jurisdiction of a nation may be tried and punished there, according to the definitions and penalties of its municipal law, which becomes for the particular purpose the international law of the case."

Report of Mr. Bayard, Sec. of State, Jan. 20, 1887, in the case of Pelletier, charged with attempt at slave trading in Haytian waters, Sen. Ex. Doc. 64, 49 Cong. 2 sess; Moore, Int. Arbitrations, II. 1799.

The law of nations, unlike foreign municipal laws,  
**Question of proof.** does not have to be proved as a fact.

The Scotia, 14 Wallace, 170; The New York (1899), 175 U. S. 187.

In *Talbot v. Seeman* (1801), 1 Cranch, 1, 37, it was held that certain French, decrees, including that of January 18, 1798, affecting neutral commerce "having been promulgated in the United States as the law of France, by the joint act of that department which is intrusted with foreign intercourse, and of that which is invested with the powers of war, seems to assume a character of notoriety which renders it admissible in our courts."

## CHAPTER II.

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## I. DEFINITIONS OF THE STATE.

### § 3.

International law is concerned with the relations of states which constitute the society of nations. In this sense the words "state" and "nation" are used synonymously, without regard to the distinction which political science draws between them. The word state, as used in international law, has been variously defined. Most of the definitions of the publicists may, however, be traced back, in substance if not in form, to Cicero, who, in his *De Re Publica*, defines the "populus" as a numerous society united by a common sense of right and a mutual participation in advantages.<sup>a</sup> In almost the same words Grotius defined the state (*civitas*) as a perfect society of free men, united for the promotion of right and the common advantage.<sup>b</sup> Pufendorf propounded the idea, which has been so generally adopted, of treating the state as a moral person, endowed with a collective will.<sup>c</sup> According to Vattel, a nation or state is a body politic or society of men who seek their well-being and common advantage in the combination of their forces.<sup>d</sup> This definition is substantially adopted by Wheaton.<sup>e</sup> But it must be admitted that all the foregoing definitions are imperfect, and that they can be accepted only with certain limitations.

"For all purposes of international law, a state (*δῆμος*, *civitas*, *volk*) may be defined to be a people permanently occupying a fixed territory (*certain sedem*), bound together by common laws, habits, and customs into one body politic, exercising,

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<sup>a</sup> Est igitur res publica res populi: populus autem non omnis hominum cœtus quoquo modo congregatus, sed cœtus multitudinis juris consensu et utilitatis communione sociatus. (De Re Publica, Lib. I. XXV. 39, M. Tullii Ciceronis Opera Omnia, Nobbe, Lipsiæ, A. D. 1850, p. 1178.)

<sup>b</sup> Est autem civitas cœtus perfectus liberorum hominum, juris fruendi et communis utilitatis causâ sociatus. (De Jure Belli ac Pacis, L. I. c. I. § XIV. No. 2.)

<sup>c</sup> C'est une personne morale composée, dont la volonté formée par l'assemblage des volontés de plusieurs, réunies en vertu de leurs conventions, est réputée la volonté de tous généralement, et autorisée par cette raison à se servir des forces et des facultés de chaque particulier pour procurer la paix et la sûreté commune. (Le Droit de la Nature et des Gens., trad. par Barbeyrac, VII. c. 2, § 13.)

<sup>d</sup> Prélim., § 1; L. I. ch. 1, § 1.

<sup>e</sup> "A body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage by their combined strength." Elements of International Law, C. II. § 2. Both in Lawrence's and in Dana's edition of Wheaton the definition of Cicero is quoted erroneously.



through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace, and of entering into all international relations with the other communities of the globe. It is a sound general principle, and one to be laid down at the threshold of the science of which we are treating, that international law has no concern with the form, character, or power of the constitution or government of a state, with the religion of its inhabitants, the extent of its domain, or the importance of its position and influence in the commonwealth of nations. 'Russia and Geneva have equal rights.'<sup>a</sup> \* \* \* Provided that the state possess a government capable of securing at home the observance of rightful relations with other states, the demands of international law are satisfied."

Phillimore, Int. Law, 3rd ed., I. 81.

**Excluded associations.** The definition of the state must be "understood with the following limitations:

"1. It must be considered as excluding corporations, public or private, created by the state itself, under whose authority they exist, whatever may be the purposes for which the individuals composing such bodies politic may be associated.

"Thus the great association of British merchants incorporated, first, by the crown, and afterwards by Parliament, for the purpose of carrying on trade to the East Indies, could not be considered as a state, even whilst it exercised the sovereign powers of war and peace in that quarter of the globe without the direct control of the crown, and still less can it be so considered since it has been subjected to that control. Those powers are exercised by the East India Company in subordination to the supreme power of the British Empire, the external sovereignty of which is represented by the company towards the native princes and people, whilst the British government itself represents the company towards other foreign sovereigns and states.

"2. Nor can the denomination of a state be properly applied to voluntary associations of robbers or pirates, the outlaws of other societies, although they may be united together for the purpose of promoting their own mutual safety and advantage.

"3. A state is also distinguishable from an unsettled horde of wandering savages not yet formed into civil society. The legal idea of a state necessarily implies that of the habitual obedience of its members to those persons in whom the superiority is vested, and of a fixed abode, and definite territory belonging to the people by whom it is occupied."

Wheaton, Elements of Int. Law, Chap. II, § 2. See, as to migratory hordes, bands of pirates, societies united *sceleris causa*, and the former piratical states of northern Africa, Phillimore, Int. Law, 3rd ed., I. 82-85.

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<sup>a</sup> Marshall, C. J., *The Antelope*, 10 Wheaton, 66.

Rivier, in his treatise on international law,<sup>a</sup> enumerates, as "the essential elements of the state," which he defines as "an independent community, organized in a permanent manner on a certain territory," the following: "Territory and population, collective will and government, independence and permanence." Hence he excludes from the category of the state, which he describes as a "moral person" and "the subject of the law of nations," a horde or nomadic tribe; the negro tribes of Africa and the native races of Australia; the North American Indians, although the United States has allowed them, on grounds of expediency, a certain national existence; and chance communities, organized temporarily, such as bands of brigands and associations of pirates. States, existing and recognized as such, which give themselves over, accidentally or even habitually, to acts of spoliation and ransom, like certain Greek states of antiquity and later still the predatory states of Barbary, do not, he says, for that reason cease to be states. But an association of malefactors, which installed itself on a territory, could not pretend to be treated as a nation, even though it should take the name; war would not be made upon its members according to the laws of war; they would be chastised as criminals, and, in the repression of their depredations on the sea, there would be no question of booty properly so-called or of the observance of the rules of law in regard to prizes. And if anarchists should undertake to found an establishment of some importance, with a view to live according to their maxims, it would not be a state, since the anarchist utopia excludes the idea of government.

Religious communities, continues Rivier, are not states; although, for special reasons, the Holy See occupies a position analogous to that of states, and the Pope is treated as a sovereign, and even as a privileged sovereign. Nor do we recognize the personality of the law of nations in communities and corporations which, although they are permanent and organized, and have a territorial seat, are subordinate—such as communes, provinces, and colonies, and *a fortiori* political, scientific, industrial, and commercial corporations and societies. Great companies, established for purposes essentially commercial and industrial, may obtain from the state charters or letters-patent, delegating a part of its powers, as, for example, the English companies in Africa—the Royal Niger Company (1886), the East African Company (1888), and the South African Company (1889). Such, also, was the Hudson's Bay Company, and especially the East India Company, which for many years had, under the authority of the British Government, an existence analogous to that of states, possessing notably the powers of peace and war with reference to the Hindus. Nor was the Hanseatic League a state; very powerful at certain moments, it was only a league

<sup>a</sup>Principes du Droit des Gens, par Alphonse Rivier, Paris, 1896, 2 vols.

of cities, as much territorial as imperial, endowed with important political privileges, but without a proper (propre) existence, and not recognized as an independent community.

Sovereigns, or the heads of states, are sometimes considered as persons or subjects of the law of nations. But, while sovereigns are the universal representatives of states, it is only on this ground that they can be considered as having, and then only indirectly, a personality under the law of nations. This conception, however, seems to be superfluous. More erroneous still is the doctrine which sees in the man a subject of the law of nations; the man has international rights only in his character of a subject or citizen of a state, and through the intermediary of that state.

The ethnographic nationalities, the real or pretended races to which the inhabitants of the territory belong, and the languages which those inhabitants speak have no direct influence from the point of view of the law of nations; but they have a moral importance, political and social, which may be very considerable.

*Principes du Droit des Gens*, I. 45-51.

“The native princes who acknowledge the imperial majesty of the United Kingdom have no international existence. That their dominions are contrasted with the dominions of the Queen, and that their subjects are contrasted with the subjects of the Queen, are niceties of speech handed down from other days and now devoid of international significance, though their preservation may be convenient for purposes internal to the Empire; in other words, for constitutional purposes. So, too, the term ‘protectorate’ as applied to the Empire in its relation to those princes, and the description of their subjects, when abroad, as persons entitled to British protection, are etymologically correct; but they do not bear the technical meaning which belongs to the protection of the Republic of San Marino and its citizens by the Kingdom of Italy, or that other technical meaning which belongs to a protectorate in Central Africa. They are etymologically correct because every state is the protector of its own people, and the United Kingdom has, for international purposes, absorbed the Indian princes and their subjects into itself. And the government of India was fully justified in the notification which it published in its Official Gazette, No. 1700 E, 21st August, 1891: ‘The principles of international law have no bearing upon the relations between the government of India as representing the Queen-Empress on the one hand and the native states under the suzerainty of Her Majesty on the other. The paramount supremacy of the former presupposes and implies the subordination of the latter.’”

Westlake, *International Law*, 215; citing Lee-Warner, *The Protected Princes of India*, 373. See also Tupper, *Our Indian Protectorates*.

“We must understand by the word ‘state’ all the possessions of a nation, in whatever place they may be situated and whatever may be the distance that separates them.”

Colonial possessions.

Vattel has formulated on this subject the following important rule: ‘Whenever the political laws and the treaties have not established distinctions to the contrary, that which we call the territory of a nation includes its colonies.’”

Calvo, *Le Droit International*, cinquième éd., § 40, p. 170.

## II. SOVEREIGNTY AND INDEPENDENCE.

### § 4.

The words “sovereignty” and “independence” are often used by writers on international law as practically synonymous terms. Sometimes they are carefully distinguished. “Independence, like every negative, does not,” says Westlake, “admit of degrees. A group of men dependent in any degree on another group is not independent, but has relations with that other which as between the two are constitutional relations. Sovereignty is partible. A group of men is fully sovereign when it has no constitutional relations making it in any degree dependent on any other group; if it has such relations, so much of sovereignty as they leave it is a kind or degree of semi-sovereignty, though the constitution may not call it by that name. Thus the independence and the full sovereignty of a state are identical, but it would be an abuse of language to speak of semi-sovereignty as partial independence.”<sup>a</sup> On the other hand, there are writers who strongly object to the idea of a division of sovereignty, since sovereignty, according to their conception of it, is indivisible and has no degrees. These differences belong rather to the domain of political science than to that of international law. As international law deals with actual conditions, it recognizes the fact that there are states not in all respects independent that maintain international relations, to a greater or less extent, according to the degree of their dependence. Such states are generally called semi-sovereign. A state is sovereign, from the point of view of the law of nations, when it is independent of every other state in the exercise of its international rights externally, and in the manner in which it lives and governs itself internally.

Rivier, *Principes du Droit des Gens*. I. 52.

“Theoretically a politically organized community enters of right \* \* \* into the family of nations and must be treated in accordance with law, so soon as it is able to show that it possesses the marks of a state. The

Beginning of sovereign existence.

<sup>a</sup>Int. Law, 87.

commencement of a state dates nevertheless from its recognition by other powers; that is to say, from the time at which they accredit ministers to it, or conclude treaties with it, or in some other way enter into such relations with it as exist between states alone. For though no state has a right to withhold recognition when it has been earned, states must be allowed to judge for themselves whether a community claiming to be recognized does really possess all the necessary marks, and especially whether it is likely to live. Thus although the right to be treated as a state is independent of recognition, recognition is the necessary evidence that the right has been acquired."

Hall, *Int. Law*. 4th ed. 87. Hall maintains that, viewed as evidence of the right to be treated as independent, recognition by a parent state, though "more conclusive of independence than recognition by a third power," does not essentially differ from the latter in legal effect. He admits, however, that there is an important practical difference in the value of the evidence in the two cases, since the parent state, by recognizing its revolted provinces, precludes itself from treating subsequent recognition by other states as premature.

"Sovereignty is the supreme power by which any state is governed. This supreme power may be exercised either internally or externally. Internal sovereignty is that which is inherent in the people in any state, or vested in its ruler by its municipal constitution or fundamental laws. \* \* \* External sovereignty consists in the independence of one political society, in respect to all other political societies. \* \* \* The internal sovereignty of a state does not, in any degree, depend upon its recognition by other states. \* \* \* Thus the internal sovereignty of the United States of America was complete from the time they declared themselves 'free, sovereign, and independent States,' on the 4th of July, 1776. It was upon this principle that the Supreme Court determined, in 1808, that the several States composing the Union, so far as regards their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign states, and that they did not derive them from concessions made by the British King. The treaty of peace of 1782 contained a recognition of their independence, not a grant of it. (*McIlvaine v. Coxe's Lessee*, 4 Cranch, 212.) \* \* \* The external sovereignty of any state, on the other hand, may require recognition by other states in order to render it perfect and complete."

Wheaton, *Elements*, Chap. II. § 20, 21, Dana's ed. 31-33.

The sovereignty of the state does not preclude the assumption of obligations, by treaty or otherwise, or the existence of a servitude upon the territory of one state for the benefit of another. Nor is it incompatible with the

National obligations.

payment of tribute, where such payment is made, as to the Barbary powers prior to 1830, not as a sign of dependence, but as the price of an advantage gained or peril avoided.

Calvo, *Le Droit Int.*, cinquième ed. I. 172, § 43; Rivier, *Principes du Droit des Gens*, I. 52; Halleck, *Int. Law*, 3rd ed., by Baker, I. 68, ch. III. § 7. See, as to tributary States in the East, Mr. F. W. Seward to Mr. Evarts, Dec. 11, 1879, *For. Rel.* 1880, 194; Moore, *Int. Arbitrations*, V. 5046.

Calvo observes that the transitory obedience which a state pays to the directions of another government, or the exterior **External influence.** influence to which it may eventually have to submit, is not incompatible with the sovereignty of such state. Thus, for example, the city of Cracow was recognized by the congress of Vienna in 1815 as a free state, independent and neutral, under the protection of Russia, Austria, and Prussia. Notwithstanding the powerful influence which those three powers were thus called upon to exercise over that state, Cracow did not cease to be considered as an independent nation in its international relations till 1846, when it was incorporated with the Empire of Austria, the incorporation giving rise to a protest on the part of England, France, and Sweden, based upon the violation of the treaties of 1815.

Calvo, *Le Droit Int.*, 5th ed. I. 172, § 42.

Independence or sovereignty is sometimes guaranteed by one or more states, severally or jointly. The independence of Belgium has been guaranteed since 1831, and in virtue of **External guar- antees.** Art. II. of their treaty with the Netherlands of April 19, 1839, by the five powers; the maintenance of its independence, as well as of its neutrality, was the object of new treaties concluded at London August 9 and 11, 1870, by Great Britain and Prussia, and Great Britain and France. The independence of Luxemburg was collectively guaranteed by Austria, Great Britain, Prussia, and Russia, in the treaty of London of May 11, 1867, Art. II. Greek independence is guaranteed by France, Great Britain, and Russia.

By Art. VII. of the treaty of Paris of 1856, the contracting parties agreed each on his own part to respect the independence and territorial integrity of the Ottoman Empire. This is not a guarantee.

The independence of Switzerland is not guaranteed by the treaties of Vienna. There was no need of it, and Switzerland wished that the matter should not be brought into question. But the integrity and inviolability of Swiss territory have been guaranteed.

Rivier, *Principes du Droit des Gens*, I. 61-62.

## III. CLASSIFICATION OF STATES.

## 1. SIMPLE STATES.

## § 5.

From the point of view of their external relations, states may be classed as either simple or composite. The characteristic of the simple state is that it has one supreme government, and exerts a single will, whether it be the individual will of a sovereign ruler, or the collective will of a popular body or of a representative assembly. If this characteristic be present, it matters not that the state may be divided for purposes of administration into provinces, departments, communes, or counties, or that it may hold colonies or dependencies, exercising to a greater or less extent powers of self-government in various parts of the world. In this sense the United Kingdom of Great Britain and Ireland, with its widespread possessions, constitutes a simple state. Likewise Russia, with its extensive dominions in Europe and in Asia. France, Italy, the Netherlands, Belgium, Spain, Denmark, Portugal, and Turkey are other examples of simple states. <sup>a</sup>

## (1) SINGLE STATES.

## § 6.

The simple state may be either single, i. e., wholly separate and distinct from any other state, or it may be connected with another state by what is called a personal union. The examples given in the preceding section of simple states are also examples of single states.

## (2) PERSONAL UNION.

## § 7.

“Personal union” is the phrase reserved to denote the condition that exists where states, which are wholly separate and distinct, have the same ruling prince. If, as the result of this identity of rulers, or in connection with it, the individuality of the states be permanently merged, or held for a time in suspense, the relation is no longer properly described as a personal union. The example most frequently given of a personal union is that of Great Britain and Hanover from 1714 to 1837. The two states, though they employed ‘the same agent for a particular class of purposes,’ remained independent, with separate nationality and separate rights and obligations. Other examples that have been cited of a personal union are those of Spain and the Empire during the reign of the Emperor Charles V., Saxony and Poland from 1697 to 1763, Schleswig-Holstein and Denmark from

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<sup>a</sup> Rivier, *Principes du Droit des Gens*, I. 77.

1773 to 1863, Prussia and the principality of Neufchatel down to 1857, and the Netherlands and Luxemburg from 1815 to 1890. Leopold II., King of the Belgians, in assuming, in 1885, the post of sovereign of the Independent State of the Congo, declared that the tie between Belgium and the Congo was purely personal.

By the treaty between Denmark, France, Great Britain, and Russia, signed at London July 13, 1863, for the accession of George I. to the throne of Greece, it is expressly declared (Art. IV.) that in no case shall the crowns of Greece and Denmark be united on the same head. A similar declaration was made in the Peace of the Pyrenees, of November 7, 1659, in regard to the crowns of France and Spain.

See Rivier, *Principes du Droit des Gens*, I. 93-97; Hall, *Int. Law*, 4th ed. 25-26; Wheaton, *Elements*, Dana's ed. 60-61, § 40.

## 2. COMPOSITE STATES.

### § 8.

A composite state is one composed of two or more states. The character of the international person thus constituted depends upon the nature of the act by which the union was created and the extent to which the sovereignty of the component parts is impaired or taken away.

For the purposes of international law, composite states are usually classed as real unions, confederacies, and federal unions.

#### (1) REAL UNION.

### § 9.

Where states are not only ruled by the same prince, but are also united for international purposes by an express agreement, there is said to exist a real union. Such a union is susceptible of great variation, and its character can be determined in each individual case only by the particular terms of the agreement.

The examples most frequently cited of a real union are Austria-Hungary and Sweden and Norway. The basis of the present Austro-Hungarian union is the agreement (*Augsleich*) of 1867. While the two great divisions of the monarchy have for many purposes separate laws and separate administrative organizations, they have a single minister for foreign affairs, a single minister of war, and a single minister of finance. In foreign affairs the monarchy speaks as one person.

The kingdom of Sweden and Norway is sometimes classed as a personal union.<sup>a</sup> Each division has a separate commercial flag and to some extent separate treaties. The United States has a separate extradition treaty with Sweden signed January 14, 1893, and one with Nor-

<sup>a</sup>Wheaton, *Elements*, Dana's ed. 61, § 40.



way, signed June 7, 1893. In each case, however, the treaty was made by "The United States of America" and "His Majesty the King of Sweden and Norway;" and all the other treaties between the two parties, including the convention of May 26, 1869, in relation to nationality, comprehend Sweden and Norway as one state. The union between the kingdoms rests on the international act of August 6, 1815, by which provision is made for the election, in a certain contingency, of one and the same person as successor to the throne.

Rivier, *Principes du Droit des Gens*, I. 97-99.

(2) CONFEDERATION.

§ 10.

Where states associate themselves, in a permanent manner, for the exercise in common of their rights of sovereignty for the general advantage, they constitute a confederation. A confederation differs from an ordinary alliance or league not only in the intention of perpetuity, but also in the possession of some common organization by means of which the will of the component states is ascertained and given effect. Those states, however, retain their internal and, to a greater or less extent, their external sovereignty. Their personality in international law is not destroyed. The act by which they are bound together is called a compact. The association is a band of states (*Staatenbund*), and not a banded state (*Bundesstaat*). The common organization, or central power, represents the states, and is controlled by them. It operates upon the states, and not directly upon their inhabitants. It may be enlarged or restrained by the states by means of new agreements. The confederation itself, in spite of the intention of perpetuity, may be denounced and dissolved by the states that compose it.

Examples of confederations are: The Empire, after the Peace of Westphalia of 1648; the Germanic Confederation, from 1815 to 1866; the United Provinces of the Netherlands, from 1750 to 1795; the United States of America, from 1781 to 1789.

Wheaton, *Elements*, Dana's ed. 65-77, §§ 44-51; Rivier, *Principes du Droit des Gens*, I. 99-103.

(3) FEDERAL UNION.

§ 11.

Where states are united under a central government, which is supreme within its sphere and which possesses and exercises in external affairs the powers of national sovereignty, they are said to form a federal union. "The composite state, which results from this league, is alone a sovereign power." The act by which the union is effected

is called, not a compact, but a constitution. In its external relations, the federal union resembles a real union rather than a confederation. It differs from the former in possessing still greater centralized powers, powers which, in their relation to foreign affairs, can, in the case of some federal states, scarcely be distinguished from those of a simple state. It has the exclusive right to enter into general treaties and to make war and conclude peace, although, by its constitution, the component states may exercise certain powers of foreign intercourse, subject to the control of the central government. Its inhabitants have a common citizenship or nationality. If war breaks out between the component states it is civil war, not international.

As a type of the federal union we may take the United States. By the Constitution the Congress has power (Art. I., sec. 8) to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; to regulate commerce with foreign nations; to establish an uniform rule of naturalization; to coin money, regulate the value thereof, and of foreign coin; to define and punish piracies and felonies committed on the high seas and offences against the laws of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, and to provide and maintain a navy. On the other hand, it is provided (Art. I., sec. 10) that no State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; or, without the consent of Congress, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay. The President is invested with power (Art. II., sec. 2), by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; to nominate and, by and with the advice and consent of the Senate, appoint ambassadors, other public ministers and consuls, and (sec. 3) to receive ambassadors and other public ministers. The judicial power of the United States extends (Art. III., sec. 2) to all cases arising under treaties; to all cases affecting ambassadors, other public ministers and consuls; and to all cases of admiralty and maritime jurisdiction. And the Constitution, the laws made in pursuance thereof, and all treaties made under the authority of the United States, are (Art. VI.) declared to be the supreme law of the land, and to be binding on the judges in every State, anything in the constitution or laws of any State to the contrary notwithstanding.

“While under our Constitution and form of Government the mass of local matters is controlled by local authorities, the United States,

in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations."

The Chinese Exclusion Case, 130 U. S. 581, 604 (1889), citing *Cohens v. Virginia*, 6 Wheaton, 264, 413, and *Knox v. Lee*, 12 Wallace, 457, 555.

In Europe there are examples of federal union in Switzerland and the German Empire. The latter is so classed by publicists; and, although it is complex in structure and presents numerous theoretical difficulties, it has succeeded in practice. The relations of the several States to the Empire and to each other are not wholly regulated by the constitution of 1871. The several States preserve the right of legation; they grant exequaturs to foreign consuls within their territories, although all German consuls are sent out by the Empire; they may enter into conventions with foreign powers concerning matters not within the competence of the Empire or of the Emperor, and within the limits fixed by the laws of the Empire; and they may conclude *concordats* with the Holy See. On the other hand, by the constitution of 1871, the laws of the Empire are within their proper sphere supreme. There is one citizenship for all Germany, and all Germans in foreign countries have equal claims upon the protection of the Empire. The supervision of the Empire and its legislature comprehends, among other things, the right of citizenship; the issuing and examination of passports; the surveillance of aliens; colonization and emigration; customs duties and commerce; coinage, and the emission of paper money; foreign trade and navigation, and consular representation abroad; and the imperial army and navy. The Emperor represents the Empire among nations; enters into alliances and other conventions with foreign countries; sends and receives ambassadors; and declares war and concludes peace in the name of the Empire, with the proviso, however, that, for a declaration of war, the consent of the federal council is required, except in case of "an attack upon the territory of the confederation or its coasts."

For the German constitution of 1871, see *For. Rel.* 1871, pp. 383-393. See for commentary, Rivier, *Principles du Droit des Gens*, I. 104-108; Calvo, *Le Droit Int.*, cinq. ed. I. 184-187, 187-193, §§ 55, 56-57.

## 3. NEUTRALIZED STATES.

## § 12.

"A state is neutral which chooses to take no part in a war, and persons and property are called neutral which belong to a state occupying this position. The term has in recent times received a larger application. A condition of neutrality, or one resembling it, has been created, as it were, artificially, and the process has been called 'neutralization.' States have been permanently neutralized by convention. Not only is it preordained that such states are to abstain from taking part in a war into which their neighbors may enter, but it is also prearranged that such states are not to become principals in a war. By way of compensation for this restriction on their freedom of action, their immunity from attack is guaranteed by their neighbors, for whose collective interests such an arrangement is perceived to be on the whole expedient.

"As early as 1803 France promised constantly to employ her good offices to procure the neutrality of Switzerland Belgium, Ionian \* \* \* ; and by a declaration confirmed by the Isles, Savoy, Treaty of Vienna, art. 84, it was recited that the Switzerland.

European powers acknowledge 'that the general interest demands that the Helvetic State should enjoy the advantage of a perpetual neutrality;' and such a neutrality was guaranteed to it accordingly. The ninety-second article, confirmed by the Treaty of Paris, 1815, art. 3, and the Treaty of Turin, 1860, art. 2, extended the neutrality of Switzerland to portions of Savoy.

"By the treaties of 1831 and 1839 Belgium was recognized as 'an independent and perpetually neutral state, bound to observe the same neutrality with reference to other states.' \* \* \* At the outbreak of the war of 1870, England made treaties with France and Prussia, respectively, with a view to further securing the neutrality of Belgium.

"By the treaty of March 29, 1864, art. 2, 'the courts of Great Britain, France, and Russia, in their character of guaranteeing powers of Greece, declare, with the assent of the courts of Austria and Prussia, that the islands of Corfu and Paxo, as well as their dependencies, shall after their union to the Hellenic Kingdom enjoy the advantages of perpetual neutrality. His Majesty the King of the Hellenes engages on his part to maintain such neutrality.'"

Holland, *Studies in Int. Law*, 271-272; Rivier, *Principes du Droit des Gens*, I. 111 (Switzerland), 116 (Belgium).

By the treaty of London of May 11, 1867, Art. I, Luxemburg is declared to be a perpetually neutral state under the Luxemburg. guarantee of the courts of Austria, Great Britain, Prussia, and Russia.

By Art. X, of the general act of Berlin, of February 26, 1885, the contracting parties bound themselves to respect the neutrality of the territories of the Congo, including the territorial waters, "so long as the Powers which exercise or shall exercise the rights of sovereignty or protectorate over those territories, using their option of proclaiming themselves neutral, shall fulfill the duties which neutrality requires." August 1, 1885, Leopold II. of Belgium having become the head of the Independent State of the Congo, M. von Estvelde, administrator-general of the department of foreign affairs, informed the United States that the King, the head of that State, had charged him to say, "that in conformity with article 10 of the general act of the conference of Berlin, the Independent State of the Congo hereby declares itself perpetually neutral, and claims the advantages guaranteed by chapter 3 of the same act, at the same time that it assumes the duties which neutrality imposes."

Correspondence in relation to the affairs of the Independent State of the Congo, S. Ex. Doc. 196, 49 Cong. 1 sess. 300, 327.

By the general act of Berlin, of June 14, 1889, between the United States, Germany, and Great Britain, the Samoan Islands were declared (Art. I.) to be "neutral territory in which the citizens and subjects of the Three Signatory Powers have equal rights of residence, trade, and personal protection." By the convention between the same powers, signed at Washington, December 2, 1899, the general act of June 14, 1889, "and all previous treaties, conventions, and agreements relating to Samoa, are annulled."

#### 4. SEMI-SOVEREIGN STATES, AND PROTECTORATES.

##### (1) SEMI-SOVEREIGN STATES.

### § 13.

A state which is not a member of a composite state, but which, while it retains a certain personality in international law, is subject to the authority of another state in its foreign relations, is commonly called a semi-sovereign state. The paramount state is called the *suzerain*, and its relation to the subject state is described as *suzerainty*. The extent of the authority or subordination comprehended by this term is not determined by general rules, but by the facts of the particular case. The foreign relations of a subject state may be wholly and directly conducted through the ministry of foreign affairs of the suzerain. It may, on the other hand, maintain diplomatic relations, and, subject to the veto of the suzerain, conclude treaties of all kinds; but, more frequently, its right of initiative, if it possesses any, is confined to a limited sphere; and a consul-

general accredited to it, though he may also bear the title of agent or even of diplomatic agent, exercises only consular powers.

A common example of a semi-sovereign state is Egypt, a tributary and vassal state, under the suzerainty of the Ottoman Empire. It has a hereditary ruler, called the Khedive, who receives investiture from the Sultan of Turkey. *Egypt, Bulgaria, Transvaal, and other examples.*

In fact the country is occupied and its affairs are practically administered by Great Britain.

By the treaty of Berlin of July 13, 1878, Art. I., Bulgaria was "constituted an autonomous and tributary principality, under the suzerainty of His Imperial Majesty the Sultan," with "a Christian government and a national militia."

By Art. IV. of the convention signed at London, Feb. 27, 1884, between Great Britain and the Transvaal, it was agreed that the South African Republic would "conclude no treaty or engagement with any other state or nation other than the Orange Free State, nor with any native tribe to the eastward or westward of the Republic until the same has been approved by Her Majesty the Queen," and that "such approval shall be considered to have been granted if Her Majesty's Government shall not, within six months after receiving a copy of such treaty (which shall be delivered to them immediately upon its completion), have notified that the conclusion of such treaty is in conflict with the interests of Great Britain or any of Her Majesty's possessions in South Africa." Art. III. of the same convention provided: "If a British officer is appointed to reside at Pretoria, or elsewhere within the South African Republic, to discharge functions analogous to those of a consular officer, he will receive the protection and assistance of the Republic." The South African Republic has, however, now ceased to exist.

As to Egypt, the Khanates of Khiva and Bokhara, French Indo-China, Tunis and Madagascar, see Rivier, *Principes du Droit des Gens*, I. 86.

Treaty of Berlin, *For. Rel.* 1878, 895, 896.

London Convention of 1884, *Br. & For. State Papers*, LXXV. 5, 10.

## (2) PROTECTED STATES AND PROTECTORATES.

### § 14.

There have been and there now exist various states which are specifically designated as protected states. In a sense, it is true, every semi-sovereign state may be regarded as a protected state; and protected states are regularly classed as semi-sovereign; but it is only in certain cases that the nature or origin of the particular relation has caused the suzerain to be generally described as a protector and his office as a protectorate. Nevertheless, the protectorate is capable of every variation, both in substance and in form, of which the suzerain relation, as described in the preceding section, is susceptible; and so

convenient and accommodating has it proved to be in practice, that its name has been applied to cases that really do not lie within the domain of semi-sovereignty. The French protectorates in Indo-China and elsewhere are placed under the colonial minister, and are properly classed as colonies, and we have examples in Africa of protectorates where there was no recognized state to be protected.

Rivier, *Principes du Droit des Gens*, I. 79-93. Protectorates, Colonies, and Non-sovereign States (Protected Malay States, British India, British East Africa, Uganda, Zanzibar, Egypt, Tonking, Bulgaria, Dutch East Indies), S. Doc. 62, 55 Con. 3 Sess., Part 2, p. 627 et seq.

Colonial Systems of the World: The Colonies, Protectorates, Dependencies, and Spheres of Influence of all Nations exercising Authority outside their immediate Territory; showing Form of Government, Area, Population, Revenue, etc.; from Summary of Commerce and Finance for December, 1898, Bureau of Statistics, Treasury Department.

“The most important modern instance of a protected state is afforded by the United Republic of the Ionian Islands, established in 1815 under the protectorate of Great Britain. In this case the head of the government was appointed by England, the whole of the executive authority was practically in the hands of the protecting power, and the state was represented by it in its external relations. In making treaties, however, Great Britain did not affect the Ionian Islands, unless it expressly stipulated in its capacity of protecting power; the vessels of the republic carried a separate trading flag; the state received consuls, though it could not accredit them; and during the Crimean war it maintained a neutrality the validity of which was acknowledged in the English courts. The only protected states now existing in Europe are the republics of Andorra and San Marino, and possibly the principality of Monaco.”

Hall, *Int. Law*, 4th ed. 30.

By a treaty between Austria, France, Great Britain, Prussia, and Russia, signed at London Nov. 14, 1863, the Ionian Islands were united to Greece and were neutralized.

“The commonest case by far is now that of a protectorate exercised by a state of European civilization over one of other Countries not possessing European civilization, as that which France exercises over Tunis and that which England exercises over Zanzibar.”

“Where there is no state, that is to say, in an uncivilized region, there can be no protected state, and therefore no such protectorate as has been described in the last paragraph. But in recent times a practice has arisen by which in such regions civilized powers assume and exercise certain rights in more or less well-defined districts, to which rights and districts, for the term is used to express both the one and the other, the name of a protectorate is given by analogy. The dis-

tinctive characters of those rights are, first, that they are contrasted with territorial sovereignty, for, as far as such sovereignty extends, there is the state itself which has acquired it and not a protectorate exercised by that state; secondly, that the protectorate first established excludes all other states from exercising any authority within the district, either by way of territorial sovereignty or of a protectorate—that is to say, while it lasts, for the question remains whether a protectorate, like an inchoate title to territorial sovereignty, is not subject to conditions and liable to forfeiture on their non-fulfillment; thirdly, that the state enjoying the protectorate represents and protects the district and its population, native and civilized, in everything which relates to other powers. The analogy to the protectorate exercised over states is plainly seen in the last two characters, exclusiveness and representation with protection. It is less visible in the first character, for, where there is a protected state, the territorial sovereignty is divided between it and the protecting state, according to the arrangements existing in the particular case, while in an uncivilized protectorate it is in suspense.”

Westlake, *Int. Law*, 178. See Hall, *Foreign Powers and Jurisdiction of the British Crown*, 214.

By Art. 34 of the General Act of Berlin of Feb. 26, 1885, it was agreed that any of the contracting parties that might thereafter take possession of any territory or assume a protectorate on the continent of Africa should notify the other parties; and by Art. 35 the signatory powers “recognize the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African continent sufficient to protect existing rights, and, the case arising, freedom of trade and of transit on the conditions that may have been agreed upon.” “I am at one with Mr. Hall in the opinion . . . that a protectorate on the coast of Africa carries an obligation of establishing authority equal to that laid down in Art. 35, although that opinion for me is not based on the article but on the nature of the case. And while he considers that the obligation which he finds to be stipulated for the coast implies even for an inland protectorate a consent to civil and criminal jurisdiction over foreigners, as being necessary for the establishment of the authority, it seems to me that that consent also is carried by a protectorate over any uncivilized region, and again from the nature of the case.” (*Westlake, Int. Law*, 181.)

## 5. AMERICAN INDIANS.

### (1) THEIR DEPENDENT RELATION.

#### § 15.

“The condition of the Indians in relation to the United States is perhaps unlike that of any other two peoples in existence. Domestic dependent nations. In the general, nations not owing a common allegiance are foreign to each other. \* \* \* But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else. The Indian Territory is admitted to compose a part of the United States. \* \* \* Though the Indians



are acknowledged to have an unquestionable, and heretofore unquestioned right to the lands they occupy until that right shall be extinguished by a voluntary cession to our Government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. \* \* \* They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands or to form a political connection with them would be considered by all as an invasion of our territory and an act of hostility."

Marshall, C. J., *Cherokee Nation v. Georgia* (1821), 5 Pet. 1; holding "that an Indian tribe or nation within the United States is not a foreign State" in the sense of the Constitution, Art. III, Sec. 2, which provides that the judicial power of the United States shall extend to all cases "between a State . . . and foreign States, citizens or subjects."

See, also, *Holden v. Joy*, 17 Wall. 211; *Jones v. Meehan* (1899), 165 U. S. 1, 10.

The Cherokee Nation being "a distinct community, occupying its own territory, with boundaries accurately described," and the "whole intercourse between the United States and this nation" being, by "the Constitution and laws, vested in the Government of the United States," the laws of the State of Georgia can have no force within such territory.

*Worcester v. State of Georgia* (1832), 6 Pet. 515, 561.

"When the existing system [of agencies] was adopted the Indian race was outside of the limits of organized States and Territories, and beyond the immediate reach and operation of civilization; and all efforts were mainly directed to the maintenance of friendly relations and the preservation of peace and quiet on the frontier. All this is now changed. There is no such thing as the Indian frontier. \* \* \* None of the tribes are outside of the bounds of organized government and society, except that the Territorial system has not been extended over that portion of the country known as the Indian Territory. As a race the Indians are no longer hostile but may be considered as submissive to the control of the Government; few of them only are troublesome. Except the fragments of several bands all are now gathered upon reservations. \* \* \* They are a portion of our people, are under the authority of our Government, and have a peculiar claim upon and are entitled to the fostering care and protection of the nation."

President Cleveland, Annual Message, Dec. 6, 1886.

Congress may provide for the punishment of crimes committed on an Indian reservation not within the limits of one of the States, whether the offender be a white man or an Indian.

*United States v. Rogers* (1846), 4 How. 567.

It has been held by the Attorneys-General of the United States that while the general laws of the United States do not apply to the Indians,<sup>a</sup> the sovereignty of the United States over the territory ceded or granted to them is only partly relinquished;<sup>b</sup> that the Cherokee Nation had no power to impose taxes on persons trading among them under the authority of the United States,<sup>c</sup> and that a white man who had by intermarriage and the exercise of tribal rights become a Chickasaw or Choctaw by adoption, although he did not become subject to the criminal jurisdiction of the courts of the nation, yet became subject to their civil jurisdiction in respect of property which represented the proceeds of a grant made to him as a member of the tribe.<sup>d</sup> The Choctaws had no power to pronounce and execute sentence of death on the slave of a white man residing among them, their treaties with the United States limiting their jurisdiction in such cases to the Choctaw Nation of red men and their descendants.<sup>e</sup>

An Indian country may be considered a Territory of the United States within the act of Congress empowering any person to whom letters testamentary or of administration have been granted in any State or Territory of the United States to sue in the District of Columbia.

*Mackey v. Coxe* (1855), 18 How. 104.

By the act of March 3, 1885, sec. 9, 23 Stat. 385, Congress provided that "all Indians committing against the person or property of another Indian or other person" any of certain crimes, among which was murder, should, if the crime was committed in a Territory of the United States, whether "within or without the Indian reservation," be subject to punishment under the laws of such Territory, precisely as other persons, but should, if the crime was committed in a State and within the limits of an Indian reservation, be subject to trial and punishment under the laws and in the courts of the United States. *Held*, that this act was valid, and consequently that the United States circuit court for the District of California had jurisdiction of a murder committed by two Indians upon another Indian on a reservation in that State.

*United States v. Kagama* (1886), 118 U. S. 375. See *Ex parte Mayfield* (1890), 141 U. S. 107; case of *Crow Dog*, 109 U. S. 556.

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<sup>a</sup> 12 Op. 208, Stanbery, 1867.

<sup>b</sup> 2 Op. 693, Butler, 1834.

<sup>c</sup> 1 Op. 645, Wirt, 1824.

<sup>d</sup> 7 Op. 174, Cushing, 1855.

<sup>e</sup> 2 Op. 693, Butler, 1834.

The lands in an Indian territory, though owned by the tribe in fee under patents from the United States, are held, like **Eminent domain.** the lands of private owners everywhere within the geographical limits of the United States, subject to the exercise by the General Government of the right of eminent domain, just compensation being made in conformity with the provisions of the Constitution. Congress therefore has the power to authorize a corporation to construct a railway through such territory, and for that purpose to condemn lands, provision being made for compensation.

*Cherokee Nation v. Southern Kansas Railway Co.* (1890), 135 U. S. 641.

Members of an Indian tribe born within the United States, though they afterwards voluntarily separate themselves from **Domestic subjects, not citizens.** this tribe and take up their residence among white citizens, are not within the purview of the declaration of the fourteenth amendment that "all persons born \* \* \* in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."<sup>a</sup> They are not citizens of the United States, but are domestic subjects.<sup>b</sup> Though capable of naturalization by law or by treaty, they are not within the general statutes relating to naturalization.<sup>c</sup>

Congress, by an act of May 2, 1890, 26 Stat. 81, provided (sec. 30) that "the judicial tribunals of the Indian nations shall **Local self-government.** retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties." The act also provided (sec. 31) that the Constitution and all general laws of the United States "which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States, except in the District of Columbia, and all laws relating to national banking associations, shall have the same force in the Indian Territory as elsewhere in the United States; but nothing in this act shall be so construed as to deprive any of the courts of the civilized nations of exclusive jurisdiction over all cases arising wherein members of said nations, whether by treaty, blood, or adoption, are the sole parties, nor so as to interfere with the rights and powers of said civilized nations to punish said members for violation of the statutes and laws enacted by their national councils where such laws are not contrary to the treaties and laws of the United States."

*Held* that while the rights of local self-government possessed by the

<sup>a</sup> *Elk v. Wilkins* (1884), 112 U. S. 94.

<sup>b</sup> 7 Op. 746, Cushing, 1855.

<sup>c</sup> *Elk v. Wilkins* (1884), 112 U. S. 94, approving *McKay v. Campbell*, 2 Sawyer, 118, and *United States v. Osborne*, 6 Sawyer, 406. See, also, Wharton, *Confl. of Laws*, §§ 9, 252; *Am. Law Review*, XV. 21; XX. 183.

Indian tribes were subject to the supreme legislative authority of the United States, yet under the legislation just quoted the crime of murder committed by one Cherokee Indian upon another within the jurisdiction of the Cherokee Nation was not an offence against the laws of the United States, but an offence against the local laws of the Cherokee Nation; that the statutes of the United States with reference to proceedings by grand jury in the courts of the United States necessarily had no application; that the fifth amendment to the Constitution, which requires indictment by a grand jury in certain cases, being a limitation only upon the powers of the General Government, also had no application, since the local powers of the Cherokee Nation existed prior to the Constitution and were not Federal powers created by and springing from it; and that the question whether a statute of the Cherokee Nation which was not repugnant to the Constitution of the United States or in conflict with any treaty or law of the United States had been repealed by another statute of that nation, and the determination of what was the existing law of the Cherokee Nation as to the constitution of the grand jury, were matters solely within the jurisdiction of the courts of that nation and the decision of which did not in itself involve an infraction of the Constitution.

*Talton v. Mayes* (1896), 163 U.S. 376.

In *Lucas v. United States* (1896), 163 U.S. 612., which related to the validity of the trial by a United States court of a Choctaw Indian for the murder of a negro in the Choctaw Nation, in the Indian Territory, it was held that the victim's nonmembership of the tribe was a jurisdictional fact the burden of proving which rested upon the Government, and that the court below erred in holding that a finding of the fact that he was a negro created a presumption, although he was found within the Indian Territory, that he was not a member of the tribe.

See acts of June 7, 1897, 30 Stat. 62, 83, and June 28, 1898, 30 Stat. 495 et seq., as to jurisdiction in the Indian Territory.

The relation of the Indian tribes to the United States has been compared with that of the native States of India to Great Britain. There are points of strong resemblance and also points of difference. The princes and States of India, like the Indian tribes in the United States, have no relations with foreign powers; nor do they hold any intercourse one with another.

Westlake, *Int. Law*, "The Empire of India in Relation to International Law," 211, and "The Empire of India in relation to Constitutional Law," 219; Lawrence's *Wheaton* (1863), 70, 71.

At an early day Mr. John Quincy Adams maintained that "the right of the citizens of the United States to hold commerce with the aboriginal natives of the northwest coast of America without the territorial jurisdiction of other nations, even in arms and ammunitions of war, is as clear and indis-

Commerce with aboriginal tribes.

putable as that of navigating the seas." But, at a late period, when no territory in America was recognized as not wholly within the jurisdiction of civilized powers, Mr. Marcy declared that "the United States may as well undertake to maintain and hold political relations with the county of Galway, in Ireland, or the shire of Perth, in Scotland, as for England to maintain or hold such relation with any tribe of American Indians outside of her own colonial possessions in America."

Mr. Adams, Sec. of State, to M. Poletica, Mar. 30, 1822, MS. notes, For. Leg.;

Mr. Marcy, Sec. of State, to Mr. Dallas, July 26, 1856, MS. Inst. Great Britain.

See, for provisions relating to the Indians, treaties of the United States: With Great Britain, Nov. 19, 1794, Art. III.; May 4, 1796; Dec. 24, 1814, Art. IX.; with Spain, Oct. 27, 1795, Art. V.; with France, April 30, 1803, Art. VI.; with Mexico, Dec. 30, 1853, Art. II.

"The Choctaws are not citizens of the United States, but constitute a separate nation, with its own form of government and laws, existing within the borders of the United States under and in accordance with treaty stipulations. Those people who go into that country must be held to have done so with full knowledge of those treaties and of the Choctaw laws, and must accept the consequences if they are found to be there without proper authority."

Mr. Adee, Acting Secretary of State, to Sir J. Poncefote, British ambassador, Aug. 2, 1894 (For. Rel. 1894, 249), in relation to the case of certain persons who claimed to be British subjects and alleged that they were to be unjustly removed from the Choctaw country.

For comments on the Five Civilized Tribes occupying the Indian Territory, and recommendations of change in their relations to the United States, see *Annual Messages of the Presidents*, Dec. 9, 1891; Dec. 6, 1897; Dec. 5, 1898. These tribes are the Cherokee, Choctaw, Chickasaw, Muscogee (or Creek), and Seminole. As to the legal status of the British North American Indians in Canada, see *Colonial Reports*, Misc., Dec. 1900, Cd. 427.

#### (2) INABILITY TO TRANSMIT TITLE.

### § 16.

On the discovery of the American continents, the nations of Europe established the principle "that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. \* \* \* The rights of the original inhabitants were in no instance entirely disregarded, but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but, \* \* \* while the different

nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves, and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy. \* \* \* The power now possessed by the Government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. \* \* \* The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands can not exist, at the same time, in different persons, or in different governments. \* \* \* All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians."

Marshall, C. J., *Johnson v. McIntosh* (1828), 8 Wheaton, 543. It was therefore held that a title obtained by private persons from an Indian tribe northwest of the Ohio, in 1773 and 1775, was invalid.

This opinion is quoted by Mr. Clayton, Sec. of State, to Mr. Squier, May 1, 1849, MS. Inst. Am. States, XV. 76 as "very apposite to the question respecting the Mosquito shore." Mr. Clayton also cited Kent's Comm. III. \*\* 360 to 400, and *Jackson v. Porter*, 2 Paine's C. C. 457.

See memorandum of Mr. J. C. Bancroft-Davis, Assistant Secretary, on the Bulama question, Int. Arbitrations, II. 1918.

No distinction was taken between vacant lands and lands occupied by the Indians. The title, subject only to the right of occupancy by the Indians, was admitted to be in the King, and he could grant the lands away, or reserve them for the Indians,

*Johnson v. McIntosh*, 8 Wheaton, 543; *Jones v. Meehan* (1899), 175 U. S. 1.

See *United States v. Fernandez*, 10 Peters, 303.

"It has been generally accepted that aboriginal inhabitants in a savage state have not such a title to the land where they may dwell or roam as to enable them to confer it upon individuals, especially from another country."

Mr. Fish, Sec. of State, to Mr. Hackett, June 12, 1873, 99 MS. Dom. Let. 207.

The United States received from Great Britain by the treaty which terminated the Revolution a ratification of prior title to all the lands within their boundaries, subject only to the Indian right of occupancy.<sup>a</sup>

Grants made by Congress in lands reserved to the Indian by treaty operate only after the extinguishment of the Indian title.<sup>b</sup>

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<sup>a</sup> Op. 321, Berrien, 1830.

<sup>b</sup> 3 Op. 56, Butler, 1836; 3 Op. 205, Butler, 1837.

The removal of the Creeks from their reserved lands, without an intention to return, was an abandonment that caused the right of occupancy and possession to vest immediately in the United States.<sup>a</sup>

In certain cases the national capacity to hold absolute title to lands in fee has been specially conceded to Indians by treaty, as in the case of the Choctaws; but, otherwise, there exists only the right of occupancy.<sup>b</sup>

(3) TREATIES.

§ 17.

By the act of Congress of March 3, 1871, 16 Stat. 566, Rev. Stats. § 2079, "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired." Since the passage of this act, agreements with the Indian tribes have been made, subject to the approval of Congress.

An Indian treaty, when duly solemnized, is as much a law of the land as is a treaty with a foreign power.

Turner v. Miss. Union, 5 McLean, 344; 1 Op. 465, Wirt, 1821.

When it is ratified in due form, the courts cannot inquire whether the tribe was properly represented by the headmen who assented to it.

Fellows v. Blacksmith, 19 How. 366.

An Indian treaty, like other treaties, may be rendered municipally ineffective by subsequent inconsistent Federal legislation; but it overrides inconsistent State laws.

Cherokee Tobacco, 11 Wall. 616, affirming 1 Dill. 204; Love v. Pamplin, 21 Fed. Rep. 755.

Only the United States can enforce the removal of the Seneca Indians under the treaties by which they agreed to remove west of the Mississippi.

Fellows v. Blacksmith, 19 How. 366.

A question of disputed boundary may be settled by the United States and an Indian tribe, between whom a previous treaty had been

<sup>a</sup> 3 Op. 230, Butler, 1837; 3 Op. 389, Grundy, 1838.

<sup>b</sup> 3 Op. 322, Butler, 1838. See, also, Cherokee Nation v. Southern Kansas Railway Co., 135 U. S. 641, *supra*, 33.

made, which left the boundary in some respects uncertain; and private rights are bound thereby.

Lattimer v. Poteet, 14 Pet. 4.

It is competent for the United States in the exercise of the treaty-making power to stipulate, in a treaty with an Indian tribe, that within the territory thereby ceded the laws of the United States, then or thereafter enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country shall be in full force and effect until otherwise directed by Congress or the President of the United States. Such a stipulation operates *proprio vigore* and is binding upon the courts although the ceded territory is situate within an organized county of a State.

U. S. v. Forty-three Gallons of Whisky, 93 U. S. 188.

Indian treaties are to be construed, other things being equal, liberally to the Indian parties.

Kansas Indians, 5 Wall. 737; Jones v. Meehan (1899), 175 U. S. 1.

In Meigs v. McClung, 9 Cranch, 11, it was held that a treaty with the Cherokees concerning lands, being the contract of both parties, could not be controlled as to its plain terms by the acts of an agent of the United States.

Where the right of an Indian tribe to the possession and use of certain lands, as long as it may choose to occupy them, is assured by treaty, a grant of such lands, absolutely *cum onere*, by Congress, to aid in building a railroad, violates an express stipulation; and a grant in general terms of "land" cannot be construed to embrace them.

The act of March 3, 1863 (12 Stat. 772), to aid in the construction of certain railroads in Kansas, embraces no part of the lands reserved to the Great and Little Osages by the treaty of June 2, 1825 (7 Stat. 240), and the treaty concluded September 29, 1865, and proclaimed January 21, 1867 (14 Stat. 687), neither makes nor recognizes a grant of such lands. The effect of the treaty is simply to provide that any right of the companies designated by the State to build the roads should not be barred or impaired by reason of the general terms of the treaty, but not to declare that such rights existed.

Leavenworth, etc. Railroad Co. v. United States, 92 U. S. 733.

By the treaty with the Ottawas, the United States agreed with the Ottawas to pay to a certain person a certain sum of money. It was held that the money must be paid, without requiring proof of the justice of the claim.

2 Op. 562, Taney, 1833.

By a treaty with the Miami Indians the United States agreed to grant to each of certain persons a section of land out of the territory



ceded by the treaty. It was advised that no other parcels than those defined could be substituted for them.

2 Op. 563, Taney, 1833.

#### 6. THE HOLY SEE.

#### § 18.

The Pope, though deprived of the territorial dominion which he formerly enjoyed, holds, as sovereign pontiff and head of the Roman Catholic Church, an exceptional position. Though, in default of territory, he is not a temporal sovereign, he is in many respects treated as such. He has the right of active and passive legation, and his envoys of the first class, his apostolic nuncios, are specially privileged. Nevertheless he does not make war, and the conventions which he concludes with states are not called treaties, but *concordats*. His relations with the Kingdom of Italy are governed, unilaterally, by the Italian law of May 13, 1871, called "the law of guarantees," against which Pius IX and Leo XIII have not ceased to protest.

Rivier, *Principes du Droit des Gens*, I. 120-123.

"Your dispatch No. 379, on the subject of the reception of the Papal nuncio and your visit to him, has been read with much interest.

"While the probabilities seem to be almost entirely against the possibility of the restoration of any temporal power to the Pope, he is still recognized as a sovereign by many of the powers of the world, which receive from him diplomatic representatives in the person of either a nuncio or a legate, or possibly in some other capacity, and which powers also accredit to him certain diplomatic representatives.

"With all such arrangements this Government abstains from interference or criticism. It is the right of those powers to determine such questions for themselves; and when one of them, at whose court this Government has a representative, receives a representative from the Pope of higher rank than that of the representative of the United States, it becomes the duty of the latter to observe toward the Pope's representative the same courtesies and formality of the first visit, prescribed by the conventional rules of intercourse and ceremonial, and of the precedence of diplomatic agents, which have been adopted and almost invariably acted upon for the last sixty years.

"In the case which forms the subject of your very interesting dispatch you pursued the course which alone would have been expected from one of your accustomed prudence and of your experience and familiarity with the proprieties of such occasions."

Mr. Fish, Sec. of State, to Mr. Cushing, Minister to Spain, June 4, 1875, For. Rel. 1875, p. 1119.

See, as to the withdrawal of the exequaturs of consuls of the Pontifical States, circular of Mr. Evarts, Sec. of State, to diplomatic officers, April 3, 1877. The exequaturs of Papal consuls in the United States had not then been formally withdrawn.

"I have to acknowledge your letter of the 23d instant, inquiring, by a series of interrogatories (twelve in number), whether it is compatible with his official duty for the United States minister to Italy to present to His Holiness the Pope and Cardinal Simeoni a memorial from the creditors of Archbishop Purcell and transmit the reply thereto. or whether the minister can be instructed by this Department to do so personally or through an agent.

"To these questions I reply: This Government, when seeking redress for citizens of the United States from residents in Italy, is limited to diplomatic appeals to the King of Italy, either through its minister at Rome or His Majesty's minister at Washington. It can not address the Pope personally, and a minister to a foreign country can only communicate officially with persons living under its sovereignty through the channels of customary international intercourse.

"It is not consistent with the public service for one of our foreign ministers to press on the tribunals, ecclesiastical or lay, of the Government to which he is accredited, the collection of private debts. The foreign minister, in seeking redress under his Government's instructions for injuries to his country or its citizens, must alone address the sovereign to whom he is accredited; and what the minister can not be instructed to do officially he can not be authorized to do in his private capacity, either personally or through an agent."

Mr. Bayard, Sec. of State, to Mr. Dwyer, Nov. 7, 1887, For. Rel. 1887, 642; copy transmitted on the same day to Mr. Stallo, United States minister to Italy, for his information, id. 641.

#### IV. *THE STATE AND ITS GOVERNMENT.*

##### 1. *DISTINCTION BETWEEN STATE AND GOVERNMENT.*

##### § 19.

Although, in speaking of the state, we commonly think of the organization called the government, yet the two ideas are separable. While it is true that a new state is not recognized till a government has been established in it capable of performing international obligations, yet it is also true that, after such recognition has once been given, the state may continue to exist, and its existence may continue to be acknowledged, even though the government may have been overthrown by an alien invader or destroyed by domestic factions, so that for the time being there is no organization that can be treated as the repository of the national power. Of these distinctions ample illustrations will be found in the next chapter, under the title "Recognition."

## 2. DE FACTO GOVERNMENTS.

## (1) DIFFERENT KINDS.

## § 20.

**Classification and Powers.** “There are several degrees of what is called *de facto* government.

“Such a government, in its highest sense, assumes a character very closely resembling that of a lawful government. This is when the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their place, and so becomes the actual government of a country. The distinguishing characteristic of such a government is, that adherents to it in war against the government *de jure* do not incur the penalties of treason; and under certain limitations, obligations assumed by it in behalf of the country, or otherwise, will, in general, be respected by the government *de jure* when restored.

“Examples of this description of government *de facto* are found in English history. The statute II. Henry VII., c. 1 (2 British Stat. at Large, 82), relieves from penalties for treason all persons who, in defence of the King, for the time being, wage war against those who endeavor to subvert his authority by force of arms, though warranted in so doing by the lawful monarch. (4 Comm. 77.)

“But this is where the usurper obtains actual possession of the royal authority of the kingdom; not when he has succeeded only in establishing his power over particular localities. Being in possession, allegiance is due to him as king *de facto*.

“Another example may be found in the Government of England under the Commonwealth, first by Parliament, and afterwards by Cromwell as Protector. It was not, in contemplation of law, a government *de jure*, but it was a government *de facto* in the most absolute sense. It incurred obligations and made conquests which remained the obligations and conquests of England after the restoration. The better opinion doubtless is, that acts done in obedience to this Government could not be justly regarded as treasonable, though in hostility to the King *de jure*. Such acts were protected from criminal prosecution by the spirit, if not by the letter, of the statute of Henry the Seventh. It was held otherwise by the judges by whom Sir Henry Vane was tried for treason (6 State Trials, 119), in the year following the restoration. But such a judgment in such a time has little authority. \* \* \*

“But there is another description of government, called also by publicists a government *de facto*, but which might, perhaps, be more aptly denominated a government of paramount force. Its distinguishing characteristics are (1), that its existence is maintained by active military power within the territories, and against the rightful authority

of an established and lawful government; and (2), that while it exists it must necessarily be obeyed in civil matters by private citizens who, by acts of obedience rendered in submission to such force, do not become responsible, as wrongdoers, for those acts, though not warranted by the laws of the rightful government. Actual governments of this sort are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority, but they may be administered, also, by civil authority, supported more or less directly by military force.

“One example of this sort of government is found in the case of Castine, in Maine, reduced to British possession during the war of 1812. \* \* \* [*United States v. Rice*, 4 Wheaton, 253.] A like example is found in the case of Tampico, occupied during the war with Mexico by the troops of the United States. \* \* \* [*Fleming v. Page*, 9 Howard, 614.] These were cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was part.”

*Thorington v. Smith* (1868), 8 Wall. 1, 8–10.

Amelia Island, on the Florida coast, at the time belonging to Spain, having been seized and occupied by the United States in 1817, on the ground that this was necessary to root out certain buccaneers who were there congregated, it was maintained that the possession of the United States could be contested only by Spain, and that the seizure by the United States, for a violation of its own law, of a vessel of a third power within the territorial waters of the island, could not be contested by such power on the ground of Spain's titular sovereignty.

Mr. Gallatin, minister to France, to Baron Pasquier, French minister of foreign affairs, June 28, 1821, Gallatin's Works, II. 187.

Grants of land made by a government in territory over which it exercises political jurisdiction *de facto*, but which does not rightfully belong to it, are invalid as against the government to which the territory rightfully belongs. When the true boundary is ascertained, or adjusted by agreement, grants made by either sovereign beyond the limits of his rightful territory, whether he had possession or not, fail for want of title in the grantor, unless confirmed by proper stipulations.

*Coffee v. Groover* (1887), 123 U. S. 1.

While the court announced and enforced in this case the rule above stated, it made the following observation, *obiter*:

“This is the general rule. Circumstances may possibly exist which would make valid the grants of a government *de facto*; as, for example, where they contravene no other rights. Grants of public domain made by Napoleon as sovereign *de facto* of France, may have had a more solid basis of legality than similar grants made by him as sovereign *de facto* of a Prussian province, derogatory to the rights of the Government and King of Prussia.”

“When a colony is in revolt, and before its independence has been acknowledged by the parent country, the colonial territory belongs, in the sense of revolutionary right, to the former, and in that of legitimacy, to the latter. It

**Insurrection and revolt.** would be monstrous to contend that in such a contingency the colonial territory is to be treated as derelict, and subject to voluntary acquisition by any third nation. That idea is abhorrent to all the notions of right which constitute the international code of Europe and America.

“And yet the assumption that, pending a war of colonial revolution, all territorial rights of both parties to the war become extinguished and the colonial territory is open to seizure by anybody, is the foundation of most of the disputed pretensions of Great Britain in Central America.”

Mr. Marcy, Sec. of State, to Mr. Dallas, July 26, 1856, MS. Instr. Great Britain, XVII. 11, 12.

“It is the duty of foreigners to avoid all interference under such circumstances [in cases of civil war], and to submit to the power which exercises jurisdiction over the places where they resort, and, while thus acting, they have a right to claim protection, and also to be exempted from all vexatious interruption, when the ascendancy of the parties is temporarily changed by the events of the contest. Undoubtedly the considerations you urge respecting the true character of an armed opposition to a government are entitled to much weight. There may be local insurrections, armed opposition to the laws, which carry with them none of the just consequences recognized by the law of nations as growing out of a state of civil war. No fixed principle can be established upon this subject, because much depends upon existing circumstances. Cases, as they arise, must be determined by the facts which they present; and the avowed objects of the parties, their relative strength, the progress they respectively make, and the extent of the movement, as well as other circumstances, must be taken into view.

“While contending parties are carrying on a civil war those portions of the country in the possession of either of them become subject to its jurisdiction, and the persons residing there owe to it temporary obedience. But when such possession is changed by the events of the war and the other party expels its opponents, the occupation it acquires carries with it legitimate authority, and the right to assume and exercise the functions of the government. But it carries with it no right, so far, at any rate, as foreigners are concerned, to give a retroactive effect to its measures and expose them to penalties and punishments and their property to forfeiture for acts which were lawful and approved by the existing government when done.”

Mr. Cass, Sec. of State, to Mr. Osma, Peruvian minister, May 22, 1858, S. Ex. Doc. 69, 35 Cong. 1 sess. 17. See also Br. and For. State Papers, XXXI. 1097 et seq.

Mr. Cass's note was based on an opinion of Attorney-General Black, May 15, 1858, 9 Op. 140. An opinion of Mr. Reverdy Johnson, as counsel, controverting some of Attorney-General Black's positions, is printed in S. Ex. Doc. 25, 35 Cong. 2 sess.

The note of Mr. Cass and the opinions just cited relate to the cases of the Georgiana and Lizzie Thompson, a full history of which is given in Moore, Int. Arbitrations, II., chap. xxxvi., 1593-1614. These cases are referred to in Lawrence's Wheaton (1863), 575, where it is stated that Mr. Cass maintained that "the citizens or subjects of a foreign nation may carry on commerce with the portions of a country in the hands of either of the parties to a civil war, and without awaiting any action on the part of their own government" toward the recognition of the insurgents. Mr. Cass, however, on the authority of Attorney-General Black, went, in the particular cases in question, somewhat further than this, and claimed for those in temporary *de facto* control an absolute right to dispose of the public property of the nation. This claim was not ultimately sustained by the United States, and the cases were dropped (Moore, Int. Arbitrations, II. 1612). It is probable that this result should be understood to affect not the general propositions stated by Mr. Cass when applied to ordinary commercial intercourse, but rather the broad interpretation sought to be given to them in ascribing to insurgents, who were afterwards defeated and dispersed, the same powers within the territory temporarily controlled by them as belonged to the permanent government.

*De facto* governments "are of two kinds. One of them is such as exists after it has expelled the regularly constituted authorities from the seats of power and the public offices and established its own functionaries in their places, so as to represent in fact the sovereignty of the nation. \* \* \* The other kind of *de facto* governments \* \* \* is such as exists where a portion of the inhabitants of a country have separated themselves from the parent state and established an independent government. The validity of its acts, both against the parent state and its citizens or subjects, depends entirely upon its ultimate success. If it fails to establish itself permanently, all such acts perish with it. If it succeed, and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation. Such was the case of the State governments under the old confederation on their separation from the British Crown. Having made good their declaration of independence, everything they did from that date was as valid as if their independence had been at once acknowledged. Confiscations, therefore, of enemy's property made by them were sustained as if made by an independent nation. But if they had failed in securing their independence and the authority of the King had been reestablished in this country, no one would contend that their acts against him, or his loyal subjects, could have been upheld as resting upon any legal foundation.

"No case has been cited in argument, and we think none can be found, in which the acts of a portion of a state unsuccessfully attempting to establish a separate revolutionary government have been sustained as a matter of legal right. As justly observed by the

late Chief Justice in *Shortridge & Co. v. Macon*, decided in the circuit, and, in all material respects, like the one at bar, 'Those who engage in rebellion must consider the consequences. If they succeed, rebellion becomes revolution, and the new government will justify its founders. If they fail, all their acts hostile to the rightful government are violations of law, and originate no rights which can be recognized by the courts of the nation whose authority and existence have been alike assailed.' Chase's Decisions, 136."

*Williams v. Bruffy* (1877), 96 U. S. 176, 185-186.

(2) MILITARY OCCUPATION.

§ 21.

"On the first day of September, 1814, Castine was captured by the enemy, and remained in his exclusive possession, under the command and control of his military and naval forces, until the ratification of the treaty of peace in February, 1815. During this period the British Government exercised all civil and military authority over the place, and established a custom-house and admitted goods to be imported, according to regulations prescribed by itself, and, among others, admitted the goods upon which duties are now demanded. These goods remained at Castine until after it was evacuated by the enemy, and upon the reestablishment of the American Government the collector of the customs, claiming a right to American duties on the goods, took the bond in question from the defendant for the security of them.

"Under these circumstances, we are of opinion that the claim for duties can not be sustained. By the conquest and military occupation of Castine \* \* \* the sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as it chose to recognize and impose. \* \* \* Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port, and goods imported into it by the inhabitants were subject to such duties only as the British Government chose to require. Such goods were, in no correct sense, imported into the United States. The subsequent evacuation by the enemy, and resumption of authority by the United States, did not, and could not, change the character of the previous transactions."

Mr. Justice Story, delivering the opinion of the court, *United States v. Rice* (1819), 4 Wheaton, 246.

Mr. Justice Story had previously held, on circuit, that Castine, while occupied by the British, was a "foreign port" in respect of the nonimportation acts. (*United States v. Hayward* (1815), 2 Gallison, 485.)

The rights of the military occupant are discussed by Attorney-General Berrien, 2 Op. 321 (1830), and by Attorney-General Black, 9 Op. 140 (1858).

On the other hand, it was held that goods imported into the United States from Tampico, Mexico, in 1847, while that port  
**Tampico.** was in the military occupation of the American forces, were subject to duties under the revenue laws as goods imported from a foreign country. It was true, said the court, "that, when Tampico had been captured, and the State of Tamaulipas subjugated, other nations were bound to regard the country, while our possession continued, as the territory of the United States, and to respect it as such. \* \* \* But yet it was not a part of this Union. \* \* \* The boundaries of the United States, as they existed when war was declared against Mexico, were not extended by the conquest. \* \* \* They remained unchanged. And every place which was out of the limits of the United States, as previously established by the political authorities of the Government, was still foreign; nor did our laws extend over it."

Fleming v. Page (1850), 9 How. 603.

"By the law of nations a conquered territory is subject to be governed by the conqueror during his military possession, and until there is either a treaty of peace, or he shall voluntarily withdraw from it. The old civil government being necessarily superseded, it is the right and duty of the conqueror to secure his conquest, and to provide for the maintenance of civil order and the rights of the inhabitants. This right has been exercised and this duty performed by our military and naval commanders, by the establishment of temporary governments in some of the conquered provinces in Mexico, assimilating them as far as practicable to the free institutions of our own country. In the provinces of New Mexico, and of the Californias, little if any further resistance is apprehended from the inhabitants to the temporary governments which have thus, from the necessity of the case and according to the laws of war, been established. It may be proper to provide for the security of these important conquests by making an adequate appropriation for purpose of erecting fortifications and defraying the expenses necessarily incident to the maintenance of our possession and authority over them."

President Polk's second annual message, 1846.

"In prosecuting a foreign war thus duly declared by Congress, we have the right, by conquest and military occupation, to acquire possession of the territories of the enemy, and, during the war, to exercise the fullest rights of sovereignty over it. The sovereignty of the enemy is in such case 'suspended,' and his laws can 'no longer be rightfully enforced' over the conquered territory, 'or be obligatory



upon the inhabitants who remain and submit to the conqueror. By the surrender the inhabitants pass under a temporary allegiance' to the conqueror, and are 'bound by such laws, and such only, as' he may choose to recognize and impose. 'From the nature of the case, no other laws could be obligatory upon them; for where there is no protection, or allegiance, or sovereignty, there can be no claim to obedience.' These are well-established principles of the laws of war, as recognized and practised by civilized nations; and they have been sanctioned by the highest judicial tribunal of our own country."

President Polk's special message, July 24, 1848.

The port of San Francisco was occupied by the United States as early as 1846. "Shortly afterward, the United States had military possession of all of Upper California. Early in 1847, the President, as constitutional commander in chief of the Army and Navy, authorized the military and naval commander of our forces in California to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered country, and to impose duties on imports and tonnage as military contributions for the support of the government and of the army which had the conquest in possession. \* \* \* No one can doubt that these orders of the President, and the action of our Army and Navy commander in conformity with them, were according to the law of arms and the right of conquest, or that they were operative until the ratification and exchange of a treaty of peace. Such would be the case upon general principles in respect to war and peace between nations. In this instance it is recognized by the treaty itself."

Cross v. Harrison, 16 How. 190.

The proclamation of General Butler at New Orleans, dated the 1st and published on the 6th of May, 1862, announcing  
**New Orleans.** that "all rights of property" would be held "invio-  
 late, subject only to the laws of the United States;" and that "all foreigners not naturalized, claiming allegiance to their respective governments, and not having made oath of allegiance to the government of the Confederate States," would be "protected in their persons and property as heretofore under the laws of the United States," did but reiterate the rules established by the legislative and executive action of the National Government; and vessels and cargoes belonging to citizens of New Orleans, or neutrals residing there, and not affected by any attempts to run the blockade, or by any act of hostility against the United States, were protected by that proclamation, though such persons, by being identified with the enemy by long voluntary residence and business relations, may have been "enemies" within the meaning of the expression as used in public law.

The Venice, 2 Wallace, 258.

A conqueror has a right to displace the preexisting authority and to assume, to such extent as he may deem proper, the exercise by himself of all powers and functions of government. He may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to his pleasure, and he may prescribe the revenues to be paid, and apply them to his own use or otherwise. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war, as settled by the law of nations.

*New Orleans v. Steamship Company*, 20 Wallace, 387.

“The first effect of the military occupation of the enemy’s territory is the severance of the former political relations of the inhabitants and the establishment of a new political power. Under this changed condition of things the inhabitants, so long as they perform their duties, are entitled to security in their persons and property and in all their private rights and relations. . . . The municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent; and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals substantially as they were before the occupation.” But, if the course of the inhabitants should render such measures indispensable to the maintenance of law and order, the commander in chief possesses “the power to replace or expel the native officials in part or altogether, to substitute new courts of his own constitution for those that now exist, or to create such new or supplementary tribunals as may be necessary.” The military occupant also collects and administers the revenues.

President McKinley to the Secretary of War, May 19, 1898, in relation to the occupation of the Philippines, *Richardson’s Messages and Papers of the Presidents*, X. 208.

See, also, President McKinley to the Secretary of War, July 13, 1898, in relation to the occupation of Santiago de Cuba, *id.*, X. 214.

The powers of courts established by the military occupant do not necessarily terminate with the cessation of the war, if such occupant retains the sovereignty of the conquered territory, and suits pending in such courts may, on the organization of civil government, be transferred by statute to the new courts so organized.

*Lietensdorfer v. Webb*, 20 How. 176.

"I transmit a copy of a note of yesterday, addressed to this Department by Sir Edward Thornton, Her Britannic Majesty's envoy extraordinary and minister plenipotentiary accredited to this Government, requesting that you may be authorized to use your good offices towards preventing the exaction by the Mexican Government of duties on goods imported by Messrs. Kelly, at Mazatlan, which duties had previously been paid to insurgents there. You will take that course accordingly. It is difficult to understand upon what ground of equity or public law such duties can be claimed. The obligation of obedience to a government at a particular place in a country may be regarded as suspended, at least, when its authority is usurped, and is due to the usurpers if they choose to exercise it. To require a repayment of duties in such cases is tantamount to the exaction of a penalty on the misfortune, if it may be so called, of remaining and carrying on business in a port where the authority of the government had been annulled. The pretension is analogous to that upon which vessels have been captured and condemned upon a charge of violating a blockade of a port set on foot by a proclamation only, without force to carry it into effect.

"The principle that duties once paid in a part of the territory of the country in possession of an enemy are not liable again to be paid when the enemy is expelled or withdraws, was solemnly decided by the Supreme Court of the United States in the case of *Rice*, 4th Wheaton, page 246.

"Since the close of the civil war in this country suits have been brought against importers for duties on merchandise paid to insurgent authorities. Those suits, however, have been discontinued, that proceeding probably having been influenced by the judgment of the Supreme Court adverted to."

Mr. Fish, Sec. of State, to Mr. Nelson, minister to Mexico, February 11, 1873, For. Rel. 1873, I. 654.

"An insurrectionary movement, under General Reyes, broke out at Bluefields in February last, and for a time exercised actual control in the Mosquito Territory. The *Detroit* was promptly sent thither for the protection of American interests. After a few weeks the Reyes government renounced the conflict, giving place to the restored supremacy of Nicaragua. During the interregnum certain public dues accruing under Nicaraguan law were collected from American merchants by the authorities for the time being in effective administrative control. Upon the titular government regaining power a second payment of these dues was demanded. Controversy arose touching the validity of the original payment of the

debt to the *de facto* regent of the territory. An arrangement was effected in April last by the United States minister and the foreign secretary of Nicaragua whereby the amounts of the duplicate payments were deposited with the British consul pending an adjustment of the matter by direct agreement between the Governments of the United States and Nicaragua. The controversy is still unsettled."

President McKinley, Annual Message, Dec. 5, 1899.

The facts in the case just referred to and the ultimate settlement of it were as follows:

February 3, 1899, General Reyes, who had lately resigned the office of governor of the department of Zelaya (the Mosquito Reservation), proclaimed at Bluefields a revolution against the titular government of President Zelaya. He took and held undisputed possession of the custom-house and other public buildings and of all the agencies of government, and from February 3 to February 25 he and his delegates exercised at Bluefields all the functions of government, including the collection of duties.<sup>a</sup> At the end of February the insurrection collapsed, and the Nicaraguan Government, after the reestablishment of its authority at Bluefields, demanded the payment to itself, by the merchants, of the amounts of duty which they had paid to the insurgent authorities during the period of their *de facto* control. Against this demand the American merchants remonstrated. The Government of the United States, on receiving the remonstrance, stated (1) that it would not support, as against the demand of Nicaragua, any Americans, if such there were, who had aided or abetted the insurrection, but (2) that Americans who had paid "under duress of person or property, or under intimidations amounting to coercion, are entitled, if second payments are demanded by the Nicaraguan Government, to make such payments under protest," and that if any Americans had made a second payment without protest, because they were required by Nicaragua so to do, they would be considered as having paid under protest.<sup>b</sup> Prior to the receipt of this instruction, however, Mr. Merry, the minister of the United States, and the commander of the U. S. S. *Detroit*, then at Bluefields, cabled a suggestion that second payments be refused, as the revolutionary government certainly was *de facto*, and such action was necessary to the maintenance of American interests and influence;<sup>c</sup> and on April 29, 1899, an

<sup>a</sup> Mr. Merry, minister to Nicaragua, to Mr. Hay, Secretary of State, April 23, 1899, For. Rel. 1899, 569.

<sup>b</sup> Mr. Hay, Secretary of State, to Mr. Merry, minister to Nicaragua, April 17, 1899, For. Rel. 1899, 566.

<sup>c</sup> For. Rel. 1899, 569.

agreement was concluded by Mr. Merry and Mr. Sanson, Nicaraguan minister for foreign affairs, under which it was arranged that the money demanded by Nicaragua should be deposited in the British consulate pending the decision of the controversy. Meanwhile the Nicaraguan authorities were to raise the embargo which they had previously placed on certain merchandise in order to compel the owners to comply with their demands.<sup>a</sup> This arrangement was approved by the United States,<sup>b</sup> and the British consul accepted the trust. The amount in dispute, which was claimed from five American firms, was \$19,673.33, Nicaraguan currency.<sup>c</sup>

Subsequently the Department of State received the sworn statements of the American merchants, which apparently showed (1) that they were not in any wise accomplices in the Reyes movement; (2) that during the period of February 3-23 the merchants did not pay current dues in cash, but gave bonds for them, and that the money actually paid was the amount due on bonds which then matured for duties levied in December, 1898, and January, 1899, the payments being made to the agent of the titular government, who held the bonds and who was continued in office by General Reyes; (3) that the bonds bore a penalty of 5 per cent a month for nonpayment, and that payment was demanded under threat of suspension of importations; and (4) that from February 3 to February 25 General Reyes was in full control and exercise of all governmental agencies, civil and military, in the district. Under these circumstances the United States expressed the opinion that to exact a second payment would be "an act of international injustice," and asked the assent of the Nicaraguan Government to the return of the money by the British consul to the depositors.<sup>d</sup>

Subsequently the Nicaraguan Government sought to bring the matter before its judicial tribunals, and to require the merchants to establish before those tribunals their "excuse" for their "unwarranted payments." To this course the United States objected, on the ground that the question had become a diplomatic one. The two Governments failed to agree on the question whether the payments were made under compulsion to a *de facto* authority, but the money was at length returned to the American merchants with the assent of Nicaragua.<sup>e</sup>

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<sup>a</sup>For. Rel. 1899, 571, 576-578.

<sup>b</sup>Mr. Hay, Secretary of State, to Mr. Merry, telegram, May 6, 1899, For. Rel. 1899, 579.

<sup>c</sup>For. Rel. 1899, 580-581.

<sup>d</sup>Mr. Hay, Secretary of State, to Mr. Merry, minister to Nicaragua, July 26, 1899, For. Rel. 1900, 803.

<sup>e</sup>For. Rel. 1900, 803-824. See also President McKinley's annual message, December 3, 1900.

## (3) THE CONFEDERATE STATES.

## § 22.

“It is very certain that the Confederate government was never acknowledged by the United States as a *de facto* government in this sense [i. e., as ‘a government *de facto* in the most absolute sense,’ such as that of England under the Commonwealth, first by Parliament, and afterwards by Cromwell as Protector]. Nor was it acknowledged as such by other powers. No treaty was made by it with any civilized state. No obligations of a national character were created by it, binding after its dissolution, on the States which it represented, or on the national government. From a very early period of the civil war to its close, it was regarded as simply the military representative of the insurrection against the authority of the United States. \* \* \*

“The central government established for the insurgent States differed from the temporary governments at Castine and Tampico in the circumstance that its authority did not originate in lawful acts of regular war; but it was not, on that account, less actual or less supreme. And we think that it must be classed among the governments of which these are examples. It is to be observed that the rights and obligations of a belligerent were conceded to it, in its military character, very soon after the war began, from motives of humanity and expediency by the United States. The whole territory controlled by it was thereafter held to be the enemies’ territory, and the inhabitants of that territory were held, in most respects, for enemies. To the extent, then, of actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent government can not be questioned. That supremacy did not justify acts of hostility to the United States. How far it should excuse them must be left to the lawful government upon the reestablishment of its authority. But it made obedience to its authority, in civil and local matters, not only a necessity but a duty. Without such obedience, civil order was impossible. It was by this government, exercising its power throughout an immense territory, that the Confederate notes were issued early in the war, and these notes in a short time became almost exclusively the currency of the insurgent States. \* \* \* They must be regarded, therefore, as a currency imposed on the community by irresistible force. It seems to follow as a necessary consequence from the actual supremacy of the insurgent government, as a belligerent, within the territory where it circulated, and from the necessity of civil obedience on the part of all who remained in it, that

this currency must be considered in courts of law in the same light as if it had been issued by a foreign government temporarily occupying a part of the territory of the United States. Contracts stipulating for payments in this currency can not be regarded for that reason only as made in aid of the foreign invasion in the one case, or of the domestic insurrection in the other. They have no necessary relations to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with *actual intent* to further invasion or insurrection. We can not doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligations."

Thorington v. Smith (1868), 8 Wall. 1, 9-11, holding that a contract for the payment of Confederate States treasury notes, made during the civil war, between persons residing within those States, could be enforced in the United States courts, the contract having been made on a sale of property in the usual course of business, and not for the purpose of giving currency to the notes or otherwise aiding the Confederate cause.

In the case of Hanauer v. Woodruff, 15 Wall. 448, the court, referring to the case of Thorington v. Smith, said: "It would have been a cruel and oppressive judgment if all the transactions of the many millions of people composing the inhabitants of the insurrectionary States for the several years of the war, had been held tainted because of the use of this forced currency [Confederate notes], when those transactions were not made with reference to the insurrectionary government." This is quoted in Baldy v. Hunter, 171 U. S. 388, 397, from the opinion of the court in the *Confederate Note Case*, 19 Wall. 548, in which parol evidence was held to be admissible to prove that the word "dollars" in a contract made during the civil war in fact meant Confederate notes.

A decree, or a judgment, when rendered upon a contract payable in Confederate treasury notes, should be for a sum equal to the value of those notes, not in the gold coin, but in the legal tender currency of the United States at the time when and place where they were payable. (*Bissell v. Heyward*, 96 U. S. 580.)

"In *Delmas v. Insurance Co.*, 14 Wall. 661, 665, upon writ of error to the supreme court of Louisiana, one of the questions presented was whether a judgment, which was otherwise conceded to be a valid prior lien for the party in whose favor it was rendered, was void because the consideration of the contract on which the judgment was rendered was Confederate money. This court said: 'This court has decided, in the case of *Thorington v. Smith*, 8 Wall. 1, that a contract was not void because payable in Confederate money, and notwithstanding the apparent division of opinion on this question in the case of *Hanauer v. Woodruff*, 10 Wall. 482, we are of the opinion that on the general principle announced in *Thorington v. Smith*, the notes of the Confederacy actually circulating as money at the time the contract was made may constitute a valid consideration for such contract.' So, in *Planters' Bank v. Union Bank*, 16 Wall. 483, 499, it was a question whether Confederate treasury notes had and received by defendants for the use of the plaintiffs were a sufficient

consideration for a promise, expressed or implied, to pay anything, and it was held upon the authority of *Thorington v. Smith*, above cited, that 'a promise to pay in Confederate notes, in consideration of the receipt of such notes and of drafts payable by them, can not be considered a *nudum pactum* or an illegal contract.'" (*Baldy v. Hunter* (1898), 171 U. S. 388, 395.)

"We admit that the acts of the several States in their individual capacities, and of their different departments of government, executive, judicial, and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government, or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in time of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary States touching these and kindred subjects, where they were not hostile *in their purpose* or mode of enforcement to the authority of the National Government, and did not impair the rights of citizens under the Constitution."

*Horn v. Lockhart*, 17 Wall. 570, 580.

- In this case (*Horn v. Lockhart*), which was a suit against an executor for an accounting as to funds in his hands, a question was raised as to whether the defendant was entitled to credit for a certain sum in Confederate notes which, in March, 1864, he invested, under the laws of Alabama, in Confederate bonds. His accounts were approved by the proper probate court in that State, credit being given for the investment in question. The Supreme Court held that this credit could not be allowed, saying: "The validity of the action of the probate court of Alabama in the present case in the settlement of the accounts of the executor we do not question, except so far as it approves the investment of funds received by him in Confederate bonds, and directs payment to the legatees of their distributive shares in those bonds. Its action in this respect was an absolute nullity, and can afford no protection to the executor in the courts of the United States." Three of the justices dissented. See, also, *Baldy v. Hunter* (1898), 171 U. S. 388, 395-397, *infra*.

"Referring to the government established in 1862 in Texas in hostility to the United States, and which at that time was in the exercise of the ordinary functions of administration, this court, in *Texas v. White*, 7 Wall. 700, 773, said: 'It is not necessary to attempt any exact definitions within which the acts of such a State government must be treated as valid, or invalid. It may be said, perhaps, with sufficient accuracy, that acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a



lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void." (Baldy v. Hunter (1898), 171 U. S. 388, 392.)

“Whether the temporary government of the Confederate States had the capacity to take and hold title to real or personal property, and how far it is to be recognized as having been a *de facto* government, and if so, what consequences follow in regard to its transactions as they are to be viewed in a court of the United States, it will be time enough for us to decide when such decision becomes necessary. There is no such necessity in the present case.”

Miller, J., delivering the opinion of the court, *Sprott v. United States*, 20 Wall. 459 (1874). Mr. Justice Field, who delivered a dissenting opinion in the case, maintained that the Confederate government had, as a *de facto* government, “the same right within its territorial limits to acquire and to dispose of movable personal property which a government *de jure* possesses.” In support of this proposition, he cited *Mauran v. Insurance Company*, 6 Wall. 14; *Thorington v. Smith*, 8 Wall. 10; *United States v. McRae*, 8 Law Reports, Equity, 69; *United States v. Prioleau*, 2 Hemming & Miller’s Chancery Cases, 559.

“The recognition of the existence and the validity of the acts of the so-called Confederate government, and that of the States which yielded a temporary support to that government, stand on very different grounds, and are governed by very different considerations. The latter, in most if not in all instances, merely transferred the existing State organizations to the support of a new and different national head. The same constitutions, the same laws for the protection of property and personal rights remained, and were administered by the same officers. \* \* \* It is only when in the use of these powers substantial aid and comfort was given or intended to be given to the rebellion, when the functions necessarily reposed in the State for the maintenance of civil society were perverted to the manifest and intentional aid of treason against the Government of the Union, that their acts are void.

“The government of the Confederate States can receive no aid from this course of reasoning. It had no existence except as a conspiracy to overthrow lawful authority. Its foundation was treason against the existing Federal Government. Its single purpose, so long as it lasted, was to make that treason successful. \* \* \* When it was overthrown it perished totally. It left no laws, no statutes, no decrees, no authority which can give support to any contract, or any act done in its service, or in aid of its purpose, or which contributed to protract its existence. So far as the actual exercise of its physical power was

brought to bear upon individuals, that may, under some circumstances, constitute a justification or excuse for acts otherwise indefensible; but no validity can be given in the courts of this country to acts voluntarily performed in direct aid and support of its unlawful purpose."

Mr. Justice Miller, delivering the opinion of the court, *Sprott v. United States*, 20 Wall. 459, 464 (1874). The point decided in this case was that a resident of Mississippi, who purchased from the Confederate government a quantity of cotton which was seized by the United States near the close of the civil war, could not maintain a claim under the Captured and Abandoned Property Act of March 12, 1863, 12 Stat. at L. 820, which shut out persons who had given any "aid or comfort to the rebellion." Messrs. Clifford and Davis, justices, concurred in the judgment of the court "solely upon the ground that the purchase of the cotton and the payment of the consideration necessarily tended to give aid to the rebellion, and that all such contracts were void, as contrary to public policy;" and they stated that "they dissented from the residue of the opinion as unnecessary to the conclusion." Mr. Justice Field dissented from the judgment of the court, on the ground that the Confederate government was a *de facto* government capable of taxing and conveying title to movable property, and that, so far as the question of aid and comfort was concerned, any disability of the claimant in that regard was removed by the President's proclamation of pardon and amnesty of December 25, 1868.

The same distinction between the acts of the Confederate government and the acts of the several States that yielded it support is expressed in *Williams v. Bruffy* (1877), 96 U. S. 176, 191-192.

All that was meant by the statement, in *Thorington v. Smith*, 8 Wall. 1, that the supremacy of the Confederate government "made obedience to its authority in civil and local matters not only a necessity, but a duty," was that "as the actual supremacy of the Confederate government existed over certain territory, individual resistance to its authority then would have been futile, and therefore unjustifiable. In the face of an overwhelming force, obedience in such matters may often be a necessity, and, in the interests of order, a duty. No concession is thus made to the rightfulness of the authority exercised." Hence the sequestration and confiscation, though enforced by judicial process, under the act of the Confederate congress of Aug. 30, 1861, of a debt due by a citizen of Virginia to a citizen of Pennsylvania, is no answer to an action against the debtor, at the suit of the creditor, after the war, for the recovery of the debt.

*Williams v. Bruffy*, 96 U. S. 176 (1877).

In April, 1862, certain shares of stock held by loyal citizens of the United States in a corporation in Charleston, S. C., were sequestered and sold, under a statute of the Confederate congress, as the property of "alien enemies," and new certificates of stock were issued to the purchasers. In February, 1865, the United States forces occupied

Charleston and seized all the property and effects of the corporation, but in May, 1866, restored them on the corporation's replacing on its books the names of the purchasers of the sequestered stock and their assignees with the names of the original holders and paying to the latter the amount of dividends declared since the beginning of the war. Held (1) that the new certificates gave no title either to the purchasers or their assignees, and should be cancelled, and (2) that the purchasers and their assignees could claim no indemnity from the company. "Nothing is better settled," said the court, "in the jurisprudence of this court than that all acts done in aid of the rebellion were illegal and of no validity. The principle has become axiomatic. It would be a mere waste of time to linger upon the point for the purpose of discussing it. *Texas v. White*, 7 Wall. 700; *Hickman v. Jones*, 9 Id. 197; *Hanauer v. Doane*, 12 Id. 342; *Knox v. Lee*, Id. 457; *Hanauer v. Woodruff*, 15 Id. 439; *Cornet v. Williams*, 20 Id. 226; *Sprott v. United States*, Id. 459.

"The transactions here in question were clearly within the category thus denounced. The order of sequestration, the sale, the transfer, and the new certificates were all utterly void. They gave no rights to the purchasers, and took none from the loyal owners. In the view of the law, the rightful relations of both to the property were just the same afterwards that they had been before. The purchasers had not then, and they have not now, a scintilla of title to the stock.

"The transferees can be no better off than their vendors."

*Dewing v. Perdicaries*, 96 U. S. 193, 195 (1877).

From the numerous decisions of the Supreme Court, beginning with the *Prize Cases*, 2 Black. 635, and ending with *Williams v. Bruffy*, 96 U. S. 176, and *Dewing v. Perdicaries*, Id. 193, the following propositions are plainly to be deduced:

"1. The district of country declared by the constituted authorities, during the late civil war, to be in insurrection against the Government of the United States, was enemy territory, and all the people residing within such district were, according to public law, and for all purposes connected with the prosecution of the war, liable to be treated by the United States, pending the war and while they remained within the lines of the insurrection, as enemies, without reference to their personal sentiments and dispositions.

"2. There was no legislation of the Confederate congress which this court can recognize as having any validity against the United States, or against any of its citizens who, pending the war, resided outside of the declared limits of the insurrection.

"3. The Confederate government is to be regarded by the courts as simply the military representative of the insurrection against the authority of the United States.

"4. To the Confederate army was, however, conceded, in the interest of humanity, and to prevent the cruelties of reprisals and retaliation, such belligerent rights as belonged under the laws of nations to the armies of independent governments engaged in war against each other; that concession placing the soldiers and officers of the rebel army, as to all matters directly connected with the mode of prosecuting the war, 'on the footing of those engaged in lawful war,' and exempting 'them from liability for acts of legitimate warfare.'"

Ford v. Surget (1878), 97 U. S. 594, 604, holding that a statute of the Confederate congress could have, as an act of legislation, no force whatever in any court recognizing the Federal Constitution as the supreme law of the land.

"From these cases it may be deduced—

"That the transactions between persons actually residing within the territory dominated by the government of the Confederate States were not invalid for the reason only that they occurred under the sanction of the laws of that government or of any local government recognizing its authority;

"That, within such territory, the preservation of order, the maintenance of police regulations, the prosecution of crimes, the protection of property, the enforcement of contracts, the celebration of marriages, the settlement of estates, the transfer and descent of property, and similar or kindred subjects, were, during the war, under the control of the local governments constituting the so-called Confederate States;

"That what occurred or was done in respect of such matters under the authority of the laws of these local *de facto* governments should not be disregarded or held to be invalid *merely* because those governments were organized in hostility to the Union established by the national Constitution; this, because the existence of war between the United States and the Confederate States did not relieve those who were within the insurrectionary lines from the necessity of civil obedience, nor destroy the bonds of society, nor do away with civil government or the regular administration of the laws, and because transactions in the ordinary course of civil society as organized within the enemy's territory, although they may have indirectly or remotely promoted the ends of the *de facto* or unlawful government organized to effect a dissolution of the Union, were without blame 'except when proved to have been entered into *with actual intent* to further invasion or insurrection;' and,

"That judicial and legislative acts in the respective States composing the so-called Confederate States should be respected by the courts if they were not 'hostile *in their purpose* or mode of enforcement to the authority of the National Government, and did not impair the rights of citizens under the Constitution.'

“Applying these principles to the case before us, we are of opinion that the mere investment by Hunter, as guardian, of the Confederate funds or currency of his ward in bonds of the Confederate States should be deemed a transaction in the ordinary course of civil society, and not, necessarily, one conceived and completed with an actual intent thereby to aid in the destruction of the Government of the Union. If contracts between parties resident within the lines of the insurrectionary States, stipulating for payment in Confederate notes issued in furtherance of the scheme to overturn the authority of the United States within the territory dominated by the Confederate States, were not to be regarded, for that reason only, as invalid, it is difficult to perceive why a different principle should be applied to the investment by a guardian of his wards’ Confederate notes or currency in Confederate bonds—both guardian and ward residing at that time, as they did from the commencement of the civil war, within the Confederate lines and under subjection to the Confederate States.

“As to the question of the intent with which this investment was made, all doubt is removed by the agreement of the parties at the trial that the investment was *bona fide*, and that the only question made was as to its legality. We interpret this agreement as meaning that the guardian had in view only the best financial interests of the ward in the situation in which both were placed, and that he was not moved to make the investment with the purpose in any way to obstruct the United States in its efforts to suppress armed rebellion. We are unwilling to hold that the mere investment in Confederate States bonds—no actual intent to impair the rights of the United States appearing—was illegal as between the guardian and ward.”

*Baldy v. Hunter* (1898), 171 U. S. 388, 400.

It appeared in this case that the defendant was appointed guardian of the plaintiff, in Georgia, in 1857. The investment of the latter’s Confederate money in Confederate bonds was made in Georgia in 1863, under leave of a local court, granted in pursuance of the act of the Georgia legislature of Dec. 16, 1861, by which guardians were authorized to invest the funds held by them in Confederate bonds. In *Lamar v. Micou*, 112 U. S. 542, the investment of a ward’s funds in Confederate bonds was held to be illegal. The court, in *Baldy v. Hunter*, distinguished that case from the one before them, as follows: “*Lamar v. Micou* was a case in which the guardian, becoming such under the laws of New York, in violation of his duty to the country, and after the war became flagrant, voluntarily went into the Confederate lines, and there gave aid and comfort to the rebellion; and yet he asked that the investment of his ward’s money in Confederate State bonds receive the sanction of the courts sitting in the State under the authority of whose laws he became and acted as guardian. Besides, it is distinctly stated in the opinion in that case that the sums which *Lamar* used in the purchase of bonds of the Confederate States were moneys of the ward in his hands ‘arising either from dividends which he had received in their behalf or from interest with which he charged himself upon sums not invested,’ 112 U. S. 476, which is a very different

thing from reinvesting (as in the present case) in Confederate currency [sic] moneys previously received in the like kind of currency. The present case is governed by considerations that do not apply to that case. We do not doubt the correctness of the decision in *Lamar v. Micou* upon its facts as set out in the report."

By section 4, Art. XIV., of the amendments to the Constitution of the United States it is provided that "neither the Confederate debts and obligations. United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void."

It was held by the mixed commission under Arts. XII.-XVII. of the treaty between the United States and Great Britain, signed at Washington, May 8, 1871, that the United States was not internationally liable for the debts of the Confederacy,<sup>a</sup> or for the acts of the Confederate forces.<sup>b</sup>

The same principle of non-liability was enforced by the mixed commission under the treaty between the United States and Mexico of July 4, 1868, in respect not only of the acts of the Confederacy, but also of acts of the Zuloaga, Miramon, and Maximilian governments in Mexico.<sup>c</sup>

## V. RIGHTS AND DUTIES OF STATES.

### 1. FUNDAMENTAL RIGHTS AND DUTIES.

#### § 23.

"The ultimate foundation of international law is an assumption that states possess rights and are subject to duties corresponding to the facts of their postulated nature. In virtue of this assumption it is held that since states exist, and are independent beings, possessing property, they have the right to do whatever is necessary for the purpose of continuing and developing their existence, of giving effect to and preserving their independence, and of holding and acquiring property, subject to the qualification that they are bound correlatively to respect these rights in others. It is also considered that their moral nature imposes upon them the duties of good faith, of concession of redress for wrongs, of regard for the personal dignity of their fellows, and to a certain extent sociability.

"Under the conditions of state life, the right to continue and develop existence gives to a state the rights:

<sup>a</sup> Moore, *Int. Arbitrations*, I. 684, 695; III. 2900-290.

<sup>b</sup> *Id.*, III. 2982-2987.

<sup>c</sup> *Id.*, III. 2886-2900, 2873-2886, 2902-2938.

"1. To organize itself in such manner as it may choose.

"2. To do within its dominions whatever acts it may think calculated to render it prosperous and strong.

"3. To occupy unappropriated territory, and to incorporate new provinces with the free consent of the inhabitants, provided that the rights of another state over any such province are not violated by its incorporation."

Hall, *Int. Law*, 4th ed., 46-47.

Wheaton *Elements*, Part II, Chapters i. and ii.

A. was indicted under sections 3 and 6 of the act of Congress of May 16, 1884, 24 Stats. at L. 22, "to prevent and punish counterfeiting within the United States of notes, bonds, and other securities of foreign governments," (1) for having in his control and custody a plate for counterfeiting notes of El Banco del Estado de Bolivar, a bank authorized by the laws of the State of Bolivar, United States of Colombia; (2) for having caused and procured the plate to be made, and (3) for causing a note of the bank in question to be falsely made. The statute under which the indictment was found was attacked on constitutional grounds. *Held*, (1) that by the Constitution of the United States all official intercourse between a State and foreign nations is prevented and exclusive authority for that purpose given to the United States; (2) that the National Government is thus "made responsible to foreign nations for all violations by the United States of their international obligations," and that for this reason Congress was expressly authorized "to define and punish \* \* \* offenses against the law of nations" (Article I., sec. 8, cl. 10); (3) that the law of nations requires every national government to use "due diligence" to prevent the commission within its dominions of a wrong to another nation or its people; (4) that because of this obligation it is the duty of one nation to punish those who within its jurisdiction counterfeit the money of another nation (Vattel, *Law of Nations*, Phila. ed. 1876, Bk. I., ch. x, pp. 46, 47); (5) that this protection is due to foreign securities, whether national or corporate, which have been put out under the sanction of public authority at home, and especially to bank notes and bank bills issued under the authority of law and forming part of the circulating medium of exchange, or money, of a country; (6) that the statute in question, having been passed for the protection of an international interest and the performance of an international duty, was properly to be considered as an act to define and punish an offense against the law of nations, and that, this being so, no objection could be made to the statute on the ground that it did not expressly declare the offense defined by it to be an offense against the law of nations.

*United States v. Arjona* (1887), 120 U. S. 479.

## 2. EQUALITY.

## § 24.

"No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone."

Marshall, C. J., *The Antelope* (1825), 10 Wheat. 66, 122.

"'Nations,' says Vattel, 'composed of men, and considered as so many free persons living together in the state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.' In other words, all sovereign states, without respect to their relative power, are, in the eye of international law, equal, being endowed with the same natural rights, bound by the same duties, and subject to the same obligations. 'One of the fundamental principles of public law, generally recognized,' says Sir William Scott, 'is the perfect equality and independence of all distinct states.' Relative magnitude creates no distinction of right; relative imbecility, whether permanent or casual, gives no additional right to the more powerful neighbor, and any advantage seized on that ground is mere usurpation. This is the great foundation of public law, which it mainly concerns the peace of mankind, both in their political and private capacities, to preserve inviolate.

"A necessary consequence of this equality of sovereign states is the general rule of public law, that 'whatever is lawful for one nation is equally lawful for any other; and whatever is unjustifiable in the one is equally so in the other.' Vattel, in discussing the sovereignty and independence of states, says that the effect of such a *status* 'is to produce, at least externally and among men, a perfect equality of rights between nations in the administration of their affairs and the pursuit of their pretensions, without regard to the intrinsic justice of their conduct, of which others have no right to form a definite judgment; so that what is permitted in one is also permitted in the other, and they ought to be considered, in human society, as having equal rights.'"

Halleck, *Int. Law* (Baker's ed., 1893), I. 116, citing Vattel, *Droit des Gens*, Prélim. §§ 18, 21; *Le Louis*, 2 Dodson, 243; *The Antelope*, 10 Wheat. 120. See, Rivier, *Principes du Droit des Gens*. I. 123; Wheaton, *Elements*, Part I., Chap. iii; Report of Mr. Bayard, Sec. of State, Jan. 20, 1887, on Pelletier case, S. Ex. Doc. 64, 49 Cong., 2 sess.

In matters of ceremonial, certain distinctions are recognized. To "empires, kingdoms, large republics, and grand duchies" there are accorded certain signs of superiority, commonly called "royal honors." Such states may be represented by diplomatic agents of the first class, namely, ambassa-



dors. Royal honors do not belong to "duchies, principalities, counties, or to ordinary republics." In matters of ceremonial, the Holy See has precedence of all states. (Rivier, *Principes du Droit des Gens*, I. 125-127.) While sovereign states possess in point of law equal fundamental rights, yet individual states, like individual men, exercise power in proportion to their influence, strength, and riches. See, in this relation, Lawrence, *Essays on some disputed Questions in Modern International Law*, Chap. V., entitled "The Primacy of the Great Powers."

### 3. PROPERTY.

#### (1) OWNERSHIP AND TRANSFER.

#### § 25.

"The rights of a state with respect to property consist in the power to acquire territory and certain other kinds of property susceptible of being held by it in absolute ownership by any means not inconsistent with the rights of other states, in being entitled to peaceable possession and enjoyment of that which it has duly obtained, and in the faculty of using its property as it chooses and alienating it at will.

"According to a theory which is commonly held, either the term 'property,' when employed to express the rights possessed by a state over the territory occupied by it, must be understood in a different sense from that which is attached to it in speaking of the property of individuals, or else its use is altogether improper. Property, it is said, belongs only to individuals; a state as such is incapable of owning it; and though by putting itself in the position of an individual it may hold property subject to the conditions of municipal law, it has merely in its proper state capacity either what is called an 'eminent domain' over the property of the members of the community forming it, in virtue of which it has the power of disposing of everything contained within its territory for the general good, or certain supreme rights, covering the same ground, but derived from sovereignty.<sup>a</sup> It can not be denied that the immediate property which is possessed by individuals is to be distinguished for certain purposes from the ultimate property in the territory of the state, and the objects of property accessory to it, which is vested in the state itself. But these purposes are foreign to international relations. The distinction, therefore, though it may be conveniently kept in mind for purposes of classification in dealing with the rules of war, has no further place in international law."

Hall, *Int. Law*, 4th ed. 47-48.

As to questions of property, including those of national proprietary rights, and public and private property, see Wheaton, *Elements*, Part II. §§ 161-163.

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<sup>a</sup> "Vattel, *Lib. I. Cap. XX. §§ 235, 244*; but see also *Lib. II. C. VII. § 81*; Heffter, § 64; Bluntschli, § 277. Calvo (§§ 208-9) distinguishes between the public and international aspects of the rights of the state with reference to property, and recognizes, as do also De Martens (*Précis du Droit des Gens Moderne de l'Europe*, § 72) and Riquelme (*Elementos de Derecho Publico Internacional*, I. 23), the absolute character of the latter relatively to other States."

## (2) SUCCESSION IN CASE OF UNSUCCESSFUL REVOLT.

## § 26.

“Certain cotton, the public property of the Confederate States of America, was consigned by the Confederate government to the defendants Prioleau and others, a firm carrying on business at Liverpool, in pursuance of an agreement between the Confederate government and the defendants, whereby the defendants were entitled out of the proceeds of the cotton to recoup themselves certain charges and expenses incurred by them under the provisions of the same agreement. The Confederate government having been dissolved, and the Confederate States having submitted to the authority of the United States government, the latter government filed a bill praying to have the cotton, which had arrived at Liverpool, delivered up to them, and for an injunction and receiver. It appeared by the evidence that the defendants had, under the agreement, a lien upon the cotton to the extent of at least 20,000 *l.* Upon motion for an injunction and receiver, *Held*, that the property in question was now the property of the United States government, but that they must take it subject to the obligations entered into respecting it by the de facto Confederate government.

“The defendant Prioleau was appointed receiver, with power to sell the cotton; but he was required to give security for its value *ultra* the 20,000 *l.*, the amount of the defendants’ lien.”

Syllabus, Wood, V. C., *United States of America v. Prioleau* (July 26, 1865), 35 L. J., Chancery, N. S. 7.

While the foregoing case was pending, Mr. Seward, in a note to Sir Frederick Bruce, June 19, 1865, took the ground that “all insurgent or piratical vessels found in ports, harbors, or waters of British dominions” should be considered as “forfeited” to the United States, and “ought to be delivered to the United States upon reasonable application.”<sup>a</sup> September 7, 1865, orders were issued by the colonial office for the detention of the Confederate cruiser *Shenandoah* in any British port she might enter.<sup>b</sup> On the 6th of November she arrived at Liverpool, where she was immediately seized by the British authorities. Mr. Adams requested her delivery up, and on the 10th of November she was transferred, by order of the board of admiralty, to the custody of the United States consul, the crew having previously been landed, with their effects.<sup>c</sup> The *London Times*, November 8, 1865, said:

“With regard to the *Shenandoah* herself, we apprehend that little hesitation can be felt. On every principle of law she belongs to that

<sup>a</sup> Dip. Cor. 1865, II. 177.

<sup>b</sup> Id., I. 657.

<sup>c</sup> Id., I. 651, 662.

government which has succeeded to all the rights and all the property of the *de facto* Confederate Government. This doctrine is laid down very clearly by Vice-Chancellor Page Wood in the decision which has been so much criticised of late in America; but in truth it is scarcely more than a rule of common sense. Lord Russell did not affect to override it by the provision in his dispatch for the disarming of Confederate vessels in our ports, but, on the contrary, facilitated the application of it through a resort to the proper civil tribunals. The captain-general of Cuba doubtless acted on the same view when he delivered over the *Stonewall* to the agents of the United States; nor, indeed, is it easy to imagine on whose behalf any counter claim could be preferred. What may be the technical formalities to be observed in the transfer is a matter of very little importance. Whether we ought to wait for a demand, or to make over the ship unasked, we hold it in trust for the United States to all intents and purposes.”<sup>a</sup>

While the Confederate ram *Stonewall* was taken possession of and delivered up to the United States by the captain-general of Cuba, with the approval of the Government at Madrid,<sup>b</sup> yet, in the case of the steamer *Harriet Lane* and certain other property of the Confederate Government at Havana, the Spanish Government took the ground that there were questions involved of a judicial nature; and the consul of the United States at Havana was empowered to proceed in the courts.<sup>c</sup>

“Upon the suppression of a rebellion, the restored legitimate government is entitled, as of right, to all moneys, goods, and treasure which were public property of the government at the time of the outbreak, such right being in no way affected by the wrongful seizure of the property by the usurping government.

“But with respect to property which has been voluntarily contributed to, or acquired by, the insurrectionary government in the exercise of its usurped authority, and has been impressed in its hands with the character of public property, the legitimate government is not, on its restoration, entitled by title paramount, but as successor only (and to that extent recognizing the authority) of the displaced usurping government; and in seeking to recover such property from an agent of the displaced government can only do so to the same extent, and subject to the same rights and obligations, as if that government had not been displaced and was itself proceeding against the agent.

“Therefore, a bill by the United States Government, after the suppression of the rebellion, against an agent of the late Confederate Government, for an account of his dealings in respect of the Confederate loan, which he was employed to raise in this country, was dis-

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<sup>a</sup> Dip. Cor. 1865, I. 652.

<sup>b</sup> Id., II. 573, 574, 576, 577, 578.

<sup>c</sup> Id., II. 554-555, 576, 578, 579.

missed with costs, in the absence of proof that any property to which the plaintiffs were entitled in their own right, as distinguished from their right as successors of the Confederate Government, ever reached the hands of the defendant, and on the plaintiff's declining to have the account taken on the same footing as if taken between the Confederate Government and the defendant as the agent of that Government, and to pay what, on the footing of such account, might be found due from them."

Syllabus, *United States of America v. McRae* (1869), 1 L. R. 8 Eq. 69, James, V. C.; quoted by Phillimore, *Int. Law*, 3rd ed., II. 154.

In 1863 the insurgent government, styled the National Government of Poland, transferred to various persons, in exchange for arms and other supplies, bonds of the "Land Credit Company (*Crédit Foncier*) of the Kingdom of Poland," which the insurgent exchequer had received by way of gift or in payment of taxes. The insurrection was soon suppressed; nor was the insurgent government recognized by any foreign power, and the Russian Government subsequently claimed paramount title to all the bonds so transferred. "It is impossible," said the Department of State, "for the United States to complain of the enforcement by Russia of a rule for which they are themselves contending. All that this Government could ask in behalf of any of its citizens holding such bonds is that they should be permitted to show before the judicial tribunals of the Empire that the bonds in question are not tainted as instruments of rebellion, or that if such taint attached to them in the hands of former holders the present assignees have acquired title in the ordinary course of business and without such notice, actual or constructive, of their obnoxious quality as, under the law of Poland and Russia, may suffice to exempt such assignees from the forfeiture to which the bonds were subject in the hands of conscious aiders of rebellion. If the commercial policy of the Russian Empire does not admit such discrimination between a tortious holder of pecuniary securities and his innocent assignees, I remain of the opinion that it is the duty of the person purchasing such securities to inform himself of the law under which the securities were created, and that he must be deemed to take and hold them subject to any defense which that law sanctioned."

Mr. Fish, Sec. of State, to Mr. Sheldon, Dec. 11, 1869, 82 MS. Dom. Let. 480, referring to the suits maintained by the United States in England and in France for the recovery of the public property of the Confederacy, and citing *Texas v. White*, 7 Wall., 700-743.

## CHAPTER III.

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## I. GENERAL PRINCIPLES.

### § 27.

Recognition, says Rivier, is the assurance given to a new state that it will be permitted to hold its place and rank, in the character of an independent political organism, in the society of nations. The rights and attributes of sovereignty belong to it independently of all recognition, but it is only after it has been recognized that it is assured of exercising them. Regular political relations exist only between states that reciprocally recognize them. Recognition is therefore useful, even necessary to the new state. It is also the constant usage, when a state is formed, to demand it. Except in consequence of particular conventions, no state is obliged to accord it. But the refusal may give rise to measures of retorsion. When, after the formation of the Kingdom of Italy, certain German states persisted in refusing to recognize it, Count Cavour withdrew the exequaturs of their consuls. Recognition was then accorded.

Sometimes there has been a long interval between the formation of a state and its recognition by other powers, notably by those which have some direct interest in the matter. The Swiss Confederation was independent, in fact, for almost two centuries before it was officially recognized as such by the Empire in 1648; and it was only in that year that Spain recognized the independence of the northern Low Countries. It was not till 1668 that Spain recognized the independence of Portugal, which had been separated from her since 1640. Greece was recognized by the guaranteeing powers in 1827; by Turkey in 1832. Belgium was not recognized by Holland till 1839. Spain and Portugal recognized the states of Latin America many years after the United States and Great Britain had done so. The latter power recognized the United States only in 1782, and it never recognized the Napoleonic kingdoms of Italy and Westphalia.

There can be no reason for refusing to recognize a federated state, formed by the union of recognized states, such as the German Empire in 1871, and the North German Confederation in 1866; or as Switzerland in 1848, after the confederation of states became a federated state. For those states, being sovereign, had the incontestable right

to bind themselves together by a federal bond. It was a matter which concerned them, and did not concern third powers.

It is necessary not to confound with the recognition of a new state, born of an insurrection, the recognition of an insurgent party as a belligerent.

Recognition is generally given by a written or oral declaration of the recognizing state; it matters little whether the

**Mode.**

recognized state cooperates in it or not.

Recognition is not necessarily express; it may be implied, as when a state enters into negotiations with the new state, sends it diplomatic agents, receives such agents officially, gives exequaturs to its consuls, forms with it conventional relations.

Recognition, in order to be definitely effective, must emanate from a government which is itself recognized. If a *de facto* government, not recognized, should accord recognition to a new state, the restored government would not be bound by that act.

Recognition may be collective, as in the case of the Independent State of the Congo, by the Berlin Conference of 1885; of Roumania, Servia, and Montenegro, by the Berlin Congress of 1878; of Greece in 1832, and of Belgium in 1831.

Premature recognition constitutes an act of intervention, committed in favor of insurgents or of a conqueror. The recognition of the United States of America by France in 1778 was in reality an act of intervention, as is shown by Art. II. of the treaty.<sup>a</sup> Great Britain recognized the Kingdom of Italy before Francis II. was entirely dispossessed.

The Government of the United States refused in 1849 to recognize the independence of Hungary, and in 1875 that of Cuba.

Recognition is, as a general rule, absolute and irrevocable. Nevertheless, it may happen, by way of exception, that the recognition is conditional or is given *sub modo*. Such is the case when certain charges or restrictions are imposed on a new state at the time when its independent existence is recognized, such as an obligatory neutrality, commercial liberty, or religious liberty. If the restriction constitutes a condition, the powers which have subjected their recognition to it have the right to insist upon the new state's conforming itself to the condition imposed, and, if it fails, to consider their recognition as not given. If the recognition was given *sub modo* it will not be withdrawn, but other measures may be taken, such as the suspension or rupture of diplomatic relations or reprisals. The distinction between a condition and a *modus*

<sup>a</sup> As to the recognition of the United States by the Netherlands in 1782, and certain medals stricken off to commemorate the event, see For. Rel. 1891, 729-731.

(*mode*) may be less precise in international law than in private law, but it is not useless. If, in case of a dispute as to the character of the clause, the matter should be submitted to arbitration, the arbitrator would, in default of clear indications, pronounce for the recognition *sub modo* rather than for the conditional recognition, seeing that the rule is irrevocability and that acts are not presumed to be done under conditions. And as independence, the essential and fundamental right of states, forms the rule, it is necessary, from the moment that a new state has been recognized, that the restriction imposed by the *modus* should be construed strictly.

Examples of restrictions imposed on the independence of a new state are the permanent neutrality of Belgium; the restrictions safeguarding religious liberty, imposed not only on Bulgaria, a semisovereign state, by Art. V. of the treaty of Berlin, but also on Montenegro by Art. XXVII. of the same treaty, on Servia by Art. XXXV., and on Roumania by Art. XLIV.; the restrictions imposed on the Independent State of the Congo in favor of commercial freedom, by the general act of the Congress of Berlin of February 26, 1885.

It goes without saying that a state may be recognized as a sovereign state without being recognized as a member of the society of nations. Such was the case of Turkey before 1856; such is still the case with divers Asiatic states with which Europe and America entertain continual and more and more intimate relations, while refusing, rightly or wrongly, to comprehend them in the international community.

Rivier, *Principes du Droit des Gens*, I. 57-61.

## II. RECOGNITION OF NEW STATES.

### 1. REVOLUTION IN SPANISH AMERICA.

#### § 28.

The invasion of Spain in 1808, resulting in the enforced abdication of Charles IV. and the transfer to Napoleon of all right and titles to the Spanish Crown and its colonial possessions, was followed in some of the Spanish colonies in America by the formation of loyal *juntas*, modeled on those that were organized in Spain, for the purpose of resisting, in the name of Ferdinand VII., son of the dethroned monarch, the new government, of which Joseph Bonaparte, who was crowned King of Spain at Bayonne on June 15, 1808, was the nominal head. Owing to various causes, among which was the refusal of the regency at Cadiz to recognize the American *juntas*, the loyalist movement in the colonies, which was originally levelled against the Napoleonic government in Spain, was succeeded by a movement for independence of Spain itself. But previously to this transformation an attempt was made to enter into diplomatic relations with the United States.

## 2. VENEZUELAN PROVINCES.

## § 29.

In 1810, the victory of Napoleon in Spain appearing to be complete, the principal inhabitants of Caracas, in the name of **Revolt at Caracas.** Ferdinand VII., deposed the Spanish colonial officials and elected a supreme junta, called the "Junta Conservatoria."

April 25, 1810, the president and vice-president of this junta addressed to the Secretary of State of the United States a letter **Agents accredited to United States.** accrediting Don Juan Vicente Bolivar and Don Telesforo Ozea as bearers of the intelligence that Venezuela had severed her allegiance to Spain.<sup>a</sup> In the course of 1810 and 1811 several papers relating to the political affairs of Venezuela were presented to the Department of State. The first recorded acknowledgment of any of these communications is found in a letter of Mr. Monroe, Secretary of State, of December 19, 1811, in which he states that he had laid before the President a copy of the declaration of independence of the provinces of Venezuela, which Don Telesforo Ozea had presented to him, and that the President had received it with the interest the matter deserved.<sup>a</sup>

In his annual message to Congress of November 5, 1811, President **President Madison's Message, November 5, 1811.** Madison said: "In contemplating the scenes which distinguish this momentous epoch, and estimating their claims to our attention, it is impossible to overlook those developing themselves among the great communities which occupy the southern portion of our own hemisphere and extend into our neighborhood. An enlarged philanthropy and an enlightened forecast concur in imposing on the national councils an obligation to take a deep interest in their destinies, to cherish reciprocal sentiments of good will, to regard the progress of events, and not to be unprepared for whatever order of things may be ultimately established."<sup>b</sup> This part of the message was referred in the House to a select committee,<sup>c</sup> which inquired of the Secretary of State whether it was known to the Government that any of the Spanish-American provinces "have declared themselves independent, or that material changes have taken place in their political relations." Mr. Monroe in reply transmitted a copy of the Venezuelan declaration, and added: "This act was communicated to this Government by order of the Congress, composed of deputies from those provinces, assembled at Caracas. It is not ascertained that any other of the Spanish provinces have as yet entered into similar declarations; but it is known

<sup>a</sup> Papers relative to the revolted Spanish provinces, MSS. Dept. of State.

<sup>b</sup> Richardson, Messages and Papers of the Presidents, I. 494.

<sup>c</sup> Annals 12th Cong., I. 335.

that most, if not all of them, on the continent are in a revolutionary state. The progress made in that direction by some of them will best appear in the documents which have already been communicated to you."<sup>a</sup> The committee, December 10, 1811, reported a joint resolution to the effect that the United States beheld "with friendly interest the establishment of independent sovereignties by the Spanish provinces in America, consequent upon the actual state of the monarchies to which they belonged; that, as neighbors and inhabitants of the same hemisphere, the United States feel great solicitude for their welfare, and that, when those provinces shall have attained the condition of nations by the just exercise of their rights, the Senate and House of Representatives will unite with the Executive in establishing with them, as sovereign and independent states, such amicable relations and commercial intercourse as may require their legislative authority."<sup>b</sup> No action on this resolution was taken.

In 1812 Caracas was destroyed by an earthquake, and many of the inhabitants of the country perished. The colonial troops were demoralized; Miranda capitulated, and from that time till 1819 the Spanish forces, under General Morillo, maintained their ascendancy. By an act of May 8, 1812, "for the relief of citizens of Venezuela," Congress authorized the President to purchase \$50,000 worth of provisions and "to tender the same in the name of the Government of the United States to that of Venezuela for the relief of the citizens who have suffered by the late earthquake." This act was carried into effect, Mr. Alexander Scott, who had been designated as an agent to visit the country, being directed to proceed in one of the vessels carrying the provisions and to aid in their distribution.<sup>c</sup>

In his annual message of December 2, 1817, President Monroe stated that orders had been issued for the suppression of an establishment formed at Amelia Island "by persons claiming to act under the authority of some of the [Spanish] colonies."<sup>d</sup> When the occupation of the island by the forces of the United States under these orders was reported, "Vicente Pazos, representing himself as the deputed agent of the authorities acting in the name of the Republics of Venezuela, New Granada, and Mexico," on March 11, 1818, addressed to the House of Representatives a protest.<sup>e</sup> A discussion ensued, in which Mr. Forsyth declared that "the question for the House to consider was whether, when the Constitution has placed the conduct of our foreign relations with the Executive, a

Temporary reascend-  
ency of Spain.

Protest as to Amelia  
Island.

<sup>a</sup> Am. State Pap., For. Rel. III. 539.

<sup>b</sup> Am. State Pap., For. Rel. III. 538; Annals, 12th Cong., I. 427-428.

<sup>c</sup> Int. Arbitrations, IV. 4392-4394. See, *infra*, § 72.

<sup>d</sup> Am. State Pap., For. Rel. IV. 130.

<sup>e</sup> Annals, 15 Cong. 1 Sess. I. 406-408.

foreign agent shall be permitted to appeal from the Executive to this House." The House, by a vote of 127 to 28, refused to receive the protest.<sup>a</sup> This protest was made by virtue of authority given by Don Lino de Clemente, at Philadelphia, as deputy from Venezuela. Later Mr. de Clemente presented himself at Washington, on December 11, 1818, as Venezuela's "representative near the United States." Mr. Adams, on the ground that he had authorized the protest above referred to, and that he had also issued at Philadelphia a paper purporting to be a commission to a foreign officer to undertake an expedition in violation of the laws of the United States, refused to confer with him or to receive from him any further communication.<sup>b</sup>

### 3. UNITED PROVINCES OF SOUTH AMERICA.

#### § 30.

May 25, 1810, there assembled at Buenos Ayres, agreeably to the summons of the viceroy, a junta of nine persons, with full powers. This was the first step in the revolution.<sup>c</sup> Six years later, on July 9, 1816, a congress at Tucuman declared the United Provinces of Rio de la Plata to be a free and independent nation.

Thereupon Colonel Don Martin Thompson, who had previously been sent to the United States as agent of the government of Buenos Ayres, was ordered to discontinue the exercise of his functions, and an appointment as agent of the United Provinces of South America was given to Don Manuel Hermenegildo de Aguirre, who also bore a semi-private authority from Chile to purchase ships of war and warlike materials. His commission did not invest him with rank as a public minister, nor did he bear a full power to negotiate as such. "Neither the letter of which he was the bearer, nor he himself, at his first interviews with the Secretary of State, suggested that he was authorized to ask the acknowledgment of his government as independent; a circumstance which derived additional weight from the fact that his predecessor, Don Martin Thompson, had been dismissed \* \* \* for having transcended his powers." Such a demand was made by him, however, in a letter of December 16, 1817, which was followed by conferences with the Secretary of State. In these conferences he stated, in response to Mr. Adams's inquiries, that the government whose acknowledgment he desired "was the country which had, before the revolution, been the

<sup>a</sup> Davis, Treaty Notes, Treaty vol., 1776-1887, p. 1270; Annals, 15 Cong. 1 Sess. 1251, 1262, 1268.

<sup>b</sup> Am. State Pap., For. Rel. IV. 412, 414.

<sup>c</sup> Am. State Pap., For. Rel. IV. 228. June 26, 1810, Mr. Joel R. Poinsett was appointed "agent to Buenos Ayres." See, *infra*, § 72.

viceroyalty of La Plata." When asked whether this did not include Montevideo, and the territory occupied by the Portuguese; the Banda Oriental, understood to be under the government of Artigas, and several provinces still in the undisputed possession of Spain, he replied that it did, but that Artigas, though hostile to the government of Buenos Ayres, supported the cause of independence, and that Portugal could not ultimately maintain possession of Montevideo. Mr. Adams stated that any acknowledgment of the government of La Plata was deemed by the President to be for the time inexpedient.<sup>a</sup>

"In the draft of a letter to Mr. Aguirre \* \* \* I have stated to him the grounds upon which the Government of the United States have been deterred from an acknowledgment of that of Buenos Ayres as including the dominion of the whole viceroyalty of the La Plata. The result of the late campaign in Venezuela, by comparing the royal and the republican bulletins, has been so far disadvantageous to the latter that they have undoubtedly failed in obtaining possession of any part of the coast. They have, therefore, at least one more campaign to contest, to go through, for which they will need several months of preparation. Bolivar appears to have resigned the chief military command to Paez, and the army is to be reorganized. But the royalists do not appear to have gained any ground, and are evidently too much weakened by their losses to act upon the offensive. In this state the independence of Venezuela can scarcely be considered in a condition to claim the recognition of neutral powers. But there is a stage in such contests when the parties struggling for independence have, as I conceive, a right to demand its acknowledgment by neutral parties, and when the acknowledgment may be granted without departure from the obligations of neutrality. It is the stage when independence is established as a matter of fact so as to leave the chances of the opposite party to recover their dominion utterly desperate. The neutral nation must, of course, judge for itself when this period has arrived; and as the belligerent nation has the same right to judge for itself, it is very likely to judge differently from the neutral and to make it a cause or pretext for war, as Great Britain did expressly against France in our Revolution, and substantially against Holland. If war thus results in point of fact from the measure of recognizing a contested independence, the moral right or wrong of the war depends upon the justice and sincerity and prudence with which the recognizing nation took the step. I am satisfied that the cause of the South Americans, so far as it consists in the assertion of independence against Spain, is just. But the justice of a cause, however it may enlist individual feelings in its favor, is not sufficient to justify third parties in siding with it. The

Opinion of Mr.  
Adams.

<sup>a</sup> Am. St. Pap., For. Rel. IV. 173-183.



fact and the right combined can alone authorize a neutral to acknowledge a new and disputed sovereignty. The neutral may, indeed, infer the right from the fact, but not the fact from the right. If Buenos Ayres confined its demand of recognition to the provinces of which it is in actual possession, and if it would assert its entire independence by agreeing to place the United States upon the footing of the most favored nation, \* \* \* I should think the time now arrived when its government might be recognized without a breach of neutrality."

Mr. Adams, Sec. of State, to the President, Aug. 24, 1818, Monroe MSS., Dept. of State.

In 1818 Mr. David C. De Forest, a citizen of the United States, applied for recognition as consul-general of the United Provinces of South America. This recognition was refused.<sup>a</sup>

Refusal to receive  
a consul. "The equality of rights to which the two parties to a civil war are entitled, in their relations with neutral powers, does not extend to the rights enjoyed by one of them, by virtue of treaty stipulations contracted before the war; neither can it extend to rights, the enjoyment of which essentially depends upon the issue of the war. That Spain is a sovereign and independent power, is not contested by Buenos Ayres, and is recognized by the United States, who are bound by treaty to receive her consuls. Mr. De Forest's credential letter asks that he may be received by virtue of a stipulation in supposed articles concluded by Mr. Worthington,<sup>b</sup> but which he was not authorized to make; so that the reception of Mr. De Forest, upon the credential on which he founds his claim would imply a recognition not only of the government of the Supreme Director, Pueyrredon, but a compact as binding upon the United States, which is a mere nullity.

"Consuls are, indeed, received by the United States from acknowledged sovereign powers with whom they have no treaty. But the exequatur for a consul-general can obviously not be granted without recognizing the authority from whom his appointment proceeds as sovereign. 'The consul,' says Vattel (book 2, chap. 2, § 34), 'is not a public minister; but as he is charged with a commission from his sovereign, and received in that quality by him where he resides, he should enjoy, to a certain extent, the protection of the law of nations.'

"If, from this state of things, the inhabitants of Buenos Ayres can not enjoy the advantage of being officially represented before the courts of the United States by a consul, while the subjects of Spain are entitled to that privilege, it is an inequality resulting from the nature of the contest in which they are engaged, and not from any

<sup>a</sup> Am. St. Pap., For. Rel. IV. 413.

<sup>b</sup> Mr. W. G. D. Worthington, agent of the United States at Buenos Ayres, negotiated certain articles which he neither had nor pretended to have any power to negotiate.

denial of their rights as parties to a civil war. The recognition of them as such, and the consequent admission of their vessels into the ports of the United States, operate with an inequality against the other party to that contest, and in their favor."

Mr. Adams, Sec. of State, to the President, Jan. 28, 1819, Am. St. Pap., For. Rel. IV. 413.

After the recognition of the South American governments, Mr. Adams refused to receive Mr. De Forest as consul-general, on the ground, among others, that his appointment as a representative of the United Provinces of La Plata proceeded from a government which no longer existed. (May 23, 1822, MS. Notes to For. Leg. III. 104.)

#### 4. CHILE.

##### § 31.

The revolutionary movement in Chile began in 1810. There was formed on November 15, 1811, a junta, which exercised the functions of government. A constitution was proclaimed in 1812. Two years afterwards the battle of Rancagua brought disaster to the revolutionary forces; but, subsequently reorganized, they gained at Chacabuco, February 12, 1817, a decisive victory. Just a year later independence was proclaimed.<sup>a</sup>

#### 5. COLOMBIA.

##### § 32.

The reconquest in the campaign of 1819 of New Granada to the revolutionary cause was followed by the formation of the Republic of Colombia, consisting of the three great divisions of the former Spanish government—Venezuela, Cundinamarca, and Quito. In November, 1820, was concluded the armistice between Generals Morillo and Bolívar; and by a subsequent treaty it was stipulated that, in case of a renewal of the war, the parties would conduct it in a manner consistent with the modern law of nations. February 20, 1821, Don Manuel Torres, as agent of the Republic of Colombia, notified the United States of the formation of that government, and asked for its recognition. The request he renewed on November 30, 1821, and again on January 2, 1822. Meanwhile, the general congress of the new republic had assembled and formed a constitution, founded on the principles of popular representation; this government was organized and was in full operation, and the principal remnant of the Spanish force was destroyed in the battle of Carabobo, the last fragments being confined to Porto Cabello and Panama.<sup>b</sup>

<sup>a</sup> Moore, Int. Arbitrations, II. 4329, 4330.

<sup>b</sup> Mr. Adams, Sec. of State, to Mr. Anderson, minister to Colombia, May 27, 1823, MS. Inst. to U. S. Ministers, IX. 274.

## 6. MEXICO.

## § 33.

August 24, 1821, General O'Donojú, commander of the armies of Spain, and Señor Don Agustín Iturbide, then leader of the movement for Mexican independence, signed a treaty of peace by which it was stipulated that Mexico should be recognized as an independent nation and in future be called the Mexican Empire. It was stated in the treaty that the Spanish government then held in Mexico only the fortresses of Vera Cruz and Acapulco, which had not the means of resisting a well-directed siege. On the 14th of the ensuing November a provisional junta invested Iturbide with the title and powers of Emperor, and on May 19, 1822, a constituent congress declared his election to that office. The Spanish Cortes refused to ratify the treaty of peace.<sup>a</sup>

## 7. PERU.

## § 34.

Owing to the opposition of the landed proprietors, who, as slaveholders, not only feared the loss of their property, but also a social upheaval such as had taken place in San Domingo, no revolutionary movement took place in Peru till 1819-20. The Peruvians even sent an army into Chile in 1813 to reestablish the Spanish government. General San Martín, however, with an army from Buenos Ayres, drove out the Peruvians in 1821, and, entering Peru itself, took Lima and Callao. The independence of Peru was proclaimed July 5, 1821.<sup>b</sup>

## 8. COURSE OF THE UNITED STATES, 1815-1822.

## § 35.

During and after 1816 much consideration was given to the question of recognizing the South American governments.

In 1817 a commission, consisting of Cæsar A. Rodney, John Graham, and Theodorick Bland, with Henry M. Bracken-  
Commission of Inquiry, 1817. ridge as secretary, was sent out to examine into the conditions existing in South America, and particularly in Buenos Ayres and Chile. The views of the commissioners, which in many respects differed, were embodied in separate reports. These reports were duly transmitted to Congress,<sup>c</sup> as was also a special report obtained from Mr. Poinsett, formerly agent at Buenos Ayres.<sup>d</sup> The

<sup>a</sup> Moore, *Int. Arbitrations*, II. 1209; Br. and For. St. Pap. VIII. 1238; IX. 431, 434, 799.

<sup>b</sup> Sen. Doc. 56, 54 Cong. 2 sess. 53.

<sup>c</sup> Messages of Nov. 17 and Dec. 15, 1818, Am. St. Pap. For. Rel. IV. 217-348.

<sup>d</sup> Am. St. Pap. For. Rel. IV. 323.

general result of these reports was that east of the Andes and south of Brazil, the government of Buenos Ayres, claiming to represent the United Provinces of South America, asserted over the whole territory a federal jurisdiction which was denied and successfully repelled by Paraguay and the Banda Oriental, and that a state of war existed between Buenos Ayres and the latter state. To the west of the Andes, Chile was in the possession of a dictator, with no representative government.<sup>a</sup>

In March, 1818, while the general appropriation bill was under consideration, Mr. Clay moved in the House an amendment appropriating \$18,000 for an outfit and a year's salary for a minister to the government of Rio de la Plata. This motion was on March 30 rejected by a vote of 115 to 45.<sup>b</sup>

"Independently of the objection to it that it had the appearance of dictating to the Executive with regard to the execution of its own duties, and of manifesting a distrust of its favorable disposition to the independence of the colonies, for which there was no cause, it was not thought advisable to adopt any measure of importance upon the imperfect information then possessed, and the motive for declining to act was the stronger from the circumstance that three commissioners had been sent to visit several parts of the South American continent, chiefly for the purpose of obtaining more precise and accurate information."<sup>c</sup>

"In August, 1818, a formal proposal was made to the British government for a concerted and contemporary recognition of the independence of Buenos Ayres, then the only one of the South American states which, having declared independence, had no Spanish force contending against it within its borders; and where it therefore most unequivocally existed in fact.

"The British government declined accepting the proposal themselves, without however expressing any disapprobation of it; without discussing it as a question of principle, and without assigning any reason for the refusal, other than that it did not then suit with their policy."

Mr. Adams, Sec. of State, to Mr. Anderson, minister to Colombia, May 27, 1823, MS. Instr. to U. S. Ministers, IX. 274, 278, 279. See, also, Adams' Memoirs, IV. 117-118.

<sup>a</sup> Davis, Treaty Notes, Treaty Vol. 1776-1887, p. 1271.

<sup>b</sup> Annals, 15 Cong., 1 sess. II. 1655; Adams' Memoirs, IV. 67, 71, 72.

<sup>c</sup> Mr. Adams, Sec. of State, to Mr. Gallatin, minister to France, May 19, 1818, MS. Instr. to U. S. Ministers, VIII. 185. In an instruction to Mr. Rush, minister to England, on the following day, Mr. Adams said: "The time is probably not remote when the acknowledgment of the South American independence will be an act of friendship towards Spain herself. When it will be kindness to her to put an end to that self-delusion under which she is wasting all the remnant of her resource, in a war, infamous by the atrocities with which it is carried on, and utterly hopeless of success."

“By a circular note, addressed by the ministers of Spain to the allied powers with whom they are respectively accredited, it appears that the allies have undertaken to mediate between Spain and the South American provinces, and that the manner and extent of their interposition would be settled by a congress which was to have met at Aix-la-Chapelle in September last. From the general policy and course of proceeding observed by the allied powers in regard to this contest, it is inferred that they will confine their interposition to the expression of their sentiments, abstaining from the application of force. I state this impression, that force will not be applied, with the greater satisfaction, because it is a course more consistent with justice, and likewise authorizes a hope that the calamities of the war will be confined to the parties only, and will be of shorter duration.

“From the view taken of this subject, founded on all the information that we have been able to obtain, there is good cause to be satisfied with the course heretofore pursued by the United States with regard to this contest, and to conclude that it is proper to adhere to it, especially in the present state of affairs.”

Annual Message of Nov. 16, 1818, Am. St. Pap. For. Rel. IV. 215. See, also, Adams' Memoirs, IV. 165-167, 205-206.

As to the opposition of the allied powers to the recognition of the independence of the Spanish colonies by the United States, see Mr. Gallatin, minister to France, to Mr. Adams, Aug. 10, 1818, Gallatin's Writings, II. 73. In another letter to Mr. Adams, Nov. 5, 1818, Mr. Gallatin (Writings, II. 75) said:

“I had upon every occasion stated that the general opinion of the United States must irresistibly lead to such a recognition; that it is a question not of interest, but of feeling, and that this arose much less from the wish of seeing new Republics established than that of the emancipation of Spanish America from Europe. \* \* \* We had not, either directly or indirectly, excited the insurrection. It had been the spontaneous act of the inhabitants and the natural effect of causes which neither the United States nor Europe could have controlled. We had lent no assistance to either party; we had preserved a strict neutrality. But no European government could be surprised or displeased that in such a cause our wishes should be in favor of the success of the colonies, or that we should treat as independent powers those amongst them which had in fact established their independence.”

“In the civil war existing between Spain and the Spanish provinces in this hemisphere the greatest care has been taken to enforce the laws intended to preserve an impartial neutrality. \* \* \* The progress of the war, however, has operated \* \* \* in favor of the colonies. Buenos Ayres still maintains unshaken the independence which it declared in 1816, and has enjoyed since 1810. Like success has also lately attended Chili, and the provinces north of the La Plata bordering on it, and likewise Venezuela. \* \* \* Should it become mani-

President Monroe's  
Message, Dec. 7,  
1819.

fest to the world that the efforts of Spain to subdue these provinces will be fruitless, it may be presumed that the Spanish Government itself will give up the contest. In producing such a determination, it can not be doubted that the opinion of friendly powers, who have taken no part in this controversy, will have their merited influence."

- Annual message of Dec. 7, 1819, Am. St. Pap. For. Rel. IV. 628.

April 4, 1820, Mr. Clay moved in the House an appropriation for an outfit and salary for such minister or ministers as the President might, with the concurrence of the Senate, send to any of the South American governments that had established and were maintaining their independence against Spain. This motion was carried by a majority of 5, but nothing further was done.<sup>a</sup>

At the next session Mr. Clay renewed his efforts in behalf of recognition. A motion for an appropriation was defeated; but a motion was carried by which it was declared that the House "participates with the people of the United States in the deep interest which they feel for the success of the Spanish provinces of South America, which are struggling to establish their liberty and independence, and that it will give its constitutional support to the President of the United States whenever he may deem it expedient to recognize the sovereignty and independency of any of the said provinces."<sup>b</sup>

"It is understood that the colonies in South America have had great success during the present year in the struggle for their independence. \* \* \* It has long been manifest that it would be impossible for Spain to reduce these colonies by force, and equally so that no conditions short of their independence would be satisfactory to them. It may, therefore, be presumed, and it is earnestly hoped, that the Government of Spain, guided by enlightened and liberal counsels, will find it to comport with its interests, due to its magnanimity, to terminate this exhausting controversy on that basis. To promote this result, by friendly counsel with the Government of Spain, will be the object of the Government of the United States."

**President's Message,**  
Dec. 3, 1821.

Annual message of Dec. 3, 1821, Davis, Treaty Notes, Treaty Vol. 1776-1887, p. 1272; Am. St. Pap. For. Rel. IV. 739.

<sup>a</sup> Davis, Treaty Notes, Treaty Vol. 1776-'887, p. 1272; Annals, 16 Cong. 1 sess. II. 1781, 2229, 2230.

<sup>b</sup> Davis, Treaty Notes, Treaty Vol. 1776-1887, p. 1272; Annals, 16 Cong. 2 sess. 1071, 1077, 1081, 1091-1092.

## 9. RECOGNITION OF AMERICAN STATES.

## § 36.

“On the 30th of January, 1822, the House requested the President to lay before it communications from the agents of *President's Message,* the United States in the revolted states, or from the *March 8, 1822.* agents of those states in the United States which might tend to show the political conditions of those Governments, and the state of war between them and Spain.<sup>a</sup> The President complied with the request in a message on the 8th of March, 1822,<sup>b</sup> which message was also communicated to the Senate on the same day.<sup>c</sup>

“In this message the President says: ‘This contest has now reached such a stage, and been attended with such decisive success on the part of the provinces, that it merits the most profound consideration whether their right to the rank of independent nations, with all the advantages incident to it in their intercourse with the United States, is not complete. Buenos Ayres assumed that rank by a formal declaration in 1816, and has enjoyed it since 1810. \* \* \* The provinces composing the Republic of Colombia, after having separately declared their independence, were united by a fundamental law of the 17th of December, 1819. \* \* \* Chili declared independence in 1818, and has since enjoyed it undisturbed, and of late, by the assistance of Chili and Buenos Ayres, the revolution has extended to Peru. Of the movement in Mexico, our information is less authentic, but it is, nevertheless, distinctly understood that the new Government has declared its independence, and that there is now no opposition to it there, nor a force to make it. \* \* \* Thus it is manifest that all those provinces are not only in the full enjoyment of their independence, but, considering the state of the war and other circumstances, that there is not the most remote prospect of their being deprived of it. \* \* \* Of the views of the Spanish Government on this subject, no particular information has been recently received. \* \* \* Nor has any authentic information been recently received of the disposition of other powers respecting it. A sincere desire has been cherished to act in concert with them in the proposed recognition. \* \* \* In proposing this measure, it is not contemplated to change thereby, in the slightest manner, our friendly relations with either of the parties, but to observe in all respects, as heretofore, should the war be continued, the most perfect neutrality between them.’<sup>d</sup>

Davis, Treaty Notes, Treaty Vol. 1776-1887, p. 1272.

<sup>a</sup> Annals, 17 Cong. 1 sess. 825-828.

<sup>b</sup> Id. 1238.

<sup>c</sup> Id. 284; Am. St. Pap. For. Rel. IV. 818.

<sup>d</sup> Am. State Pap. For. Rel. IV. 819.

March 19, 1822, the House Committee on Foreign Affairs presented a unanimous report, in which, after reviewing the facts and expressing the opinion that "it is just and expedient to acknowledge the independence of the several nations of Spanish America, without any reference to the diversity in the forms of their governments," they proposed that the House "concur in the opinion expressed by the President in his message of the 8th of March, 1822, that the American provinces of Spain, which have declared their independence and are in the enjoyment of it, ought to be recognized by the United States as independent nations," and that the Committee on Ways and Means be instructed to report a bill appropriating not more than \$100,000 "to enable the President of the United States to give due effect to such recognition."<sup>a</sup>

May 4, 1822, an act was approved entitled "An act making an appropriation to defray the expenses of missions to the independent nations of the American continent." By this act the sum of \$100,000 was appropriated "for such missions to the independent nations of the American continent as the President of the United States may deem proper."<sup>b</sup>

"In the *National Intelligencer* of this day I have seen the message of the President to the House of Representatives, in which he proposes the recognition by the United States of the insurgent governments of Spanish America. How great my surprise was may be easily judged by anyone acquainted with the conduct of Spain toward this Republic, and who knows the immense sacrifices which she has made to preserve her friendship. \* \* \* In vain will a parallel be attempted to be drawn between the emancipation of this Republic and that which the Spanish rebels attempt. \* \* \* But even admitting that morality ought to yield to policy: what is the present state of Spanish America, and what are its governments, to entitle them to recognition? Buenos Ayres is sunk in the most complete anarchy, and each day sees new despots produced, who disappear the next. Peru, conquered by a rebel army, has near the gates of its capital another Spanish army, aided by part of the inhabitants. In Chile, an individual suppresses the sentiments of the inhabitants, and his violence presages a sudden change. On the coast of Firma, also, the Spanish banner waves, and the insurgent generals are occupied in quarreling with their own compatriots, who prefer taking the part of a free power to that of being the slave of an adventurer. In Mexico, too, there is no government; and the result of the questions which the chiefs commanding there have put to Spain is not known. Where, then, are those governments which

Protest of Spanish  
minister.

<sup>a</sup> Annals, 17 Cong. 1 sess., and particularly II. 1382 et seq.

<sup>b</sup> 3 Stat. 678.



ought to be recognized? Where the pledges of their stability? Where the proof that those provinces will not return to a union with Spain, when so many of their inhabitants desire it? And, in fine, where the right of the United States to sanction and declare legitimate a rebellion without cause, and the event of which is not even decided?

"I do not think it necessary to prove that, if the state of Spanish America were such as it is represented in the message; that if the existence of its governments were certain and established; that if the impossibility of its reunion with Spain were so indisputable; and that if the justice of its recognition were so evident, the powers of Europe, interested in gaining the friendship of countries so important for their commerce, would have been negligent in fulfilling it. But, seeing how distant the prospect is of even this result, and faithful to the ties which unite them with Spain, they await the issue of the contest, and abstain from doing a gratuitous injury to a friendly Government, the advantages of which are doubtful, and the odium certain. \* \* \* I think *it my duty to protest, as I do solemnly protest, against the recognition of the governments mentioned, of the insurgent Spanish provinces of America, by the United States, declaring that it can in no way now, or at any time, lessen or invalidate in the least the right of Spain to the said provinces, or to employ whatever means may be in her power to reunite them to the rest of her dominions.*"

Mr. Anduaga, Spanish minister, to Mr. Adams, Sec. of State, March 9, 1822, Am. St. Pap. For. Rel. IX. 845.

Replying to the foregoing protest, Mr. Adams, after assuring Mr. Anduaga of the "earnestness and sincerity" with which the United States desired to cultivate "the most friendly relations" with Spain, and of the "cordial sympathy" with which it had witnessed the spirited and energetic exertions of the Spanish people to maintain "their independence of all foreign control and their right of self-government," said:

Mr. Adams' response.

"In every question relating to the independence of a nation two principles are involved, one of *right* and the other of *fact*; the former exclusively depending upon the determination of the nation itself, and the latter resulting from the successful execution of that determination. This right has been recently exercised as well by the Spanish nation in Europe as by several of those countries in the American hemisphere which had for two or three centuries been connected, as colonies, with Spain. In the conflicts which have attended these revolutions the United States have carefully abstained from taking any part, respecting the right of the nations concerned in them to maintain or reorganize their own political constitutions, and observing, wherever it was a contest by arms, a most impartial neutrality; but the civil war in which Spain was for some years involved with the

inhabitants of her colonies in America has, in substance, ceased to exist. Treaties equivalent to an acknowledgment of independence have been concluded by the commanders and viceroys of Spain herself with the Republic of Colombia, with Mexico, and with Peru, while in the provinces of La Plata and in Chili no Spanish force has for several years existed to dispute the independence which the inhabitants of those countries had declared.

“Under these circumstances, the Government of the United States, far from consulting the dictates of a policy questionable in its morality, yielded to an obligation of duty of the highest order by recognizing as independent states nations which, after deliberately asserting their right to that character, have maintained and established it against all the resistance which had been or could be brought to oppose it. This recognition is neither intended to invalidate any right of Spain, nor to affect the employment of any means which she may yet be disposed or enabled to use with the view of reuniting those provinces to the rest of her dominions. It is the mere acknowledgment of existing facts with the view to the regular establishment with the nations newly formed of those relations, political and commercial, which it is the moral obligation of civilized and Christian nations to entertain reciprocally with one another.

“It will not be necessary to discuss with you a detail of facts upon which your information appears to be materially different from that which has been communicated to this Government and is of public notoriety, nor the propriety of the denominations which you have attributed to the inhabitants of the South American provinces. It is not doubted that other and more correct views of the whole subject will very shortly be taken. \* \* \* They [the United States] confidently rely that the time is at hand when all the governments of Europe friendly to Spain, and Spain herself, will \* \* \* concur in the acknowledgment of the independence of the American nations.”

Mr. Adams, Sec. of State, to Mr. Anduaga, Spanish minister, April 6, 1822, Am. St. Pap. For Rel. IV. 846. This correspondence was communicated to the Senate April 26, 1822, agreeably to a request of that body.

“The recognition message, and the proceedings almost unanimous of both Houses of Congress on the bill making appropriations for five diplomatic missions to the south, are strong and clear indications of the disposition of the public mind in this country. Of the view which will be taken of this measure as well by Spain, as by the preponderating Powers of the European Alliance, we are yet to be informed. We trust it will not be considered, even by the British Cabinet, a rash or hasty measure at this time. Should the subject be mentioned to you by the Marquis of Londonderry, you will remark that it was not understood or intended as a change of policy on the part of the United States, nor adopted with any design of turning it to the account of our own interests. Possibly no one of the proposed diplomatic missions may be actually sent before the next session of Congress. The neutrality of the United States towards the parties, so

far as neutrality can be said to exist, where there is scarcely any war, will be continued. The relations of the United States with both parties will remain the same, with the only exception of an interchange of official, instead of informal political and commercial agents." (Mr. Adams, Sec. of State, to Mr. Rush, minister to England, No. 56, May 13, 1822, MS. Inst. to U. S. ministers, IX. 119.)

That the recognition by the United States of the independence of the Spanish colonies was received with satisfaction in England, and was "not generally unfavorably received," see Mr. Gallatin, minister to France, to Mr. Adams, April 26, 1822, Gallatin's Writings, II. 240.

"Mr. Anduaga, I observe, casts in our teeth the postponement of the recognition of Spanish America till the cession of Florida was secured, and taking that step immediately after. This insinuation will be so readily embraced by suspicious minds, and particularly by the wily cabinets of Europe, that I can not but think that it will be well to take away that pretext against us by an *exposé* brought before the public in some due form in which our conduct would be seen in its true light. An historical view of the early sentiments in favor of our neighbors expressed here, the successive steps openly taken manifesting our sympathy with their cause and our anticipation of its success, more especially our declaration of neutrality towards the contending parties as engaged in a civil, not an insurrectionary war, would show to the world that we never concealed the principles that governed us, nor the policy which terminated in the decisive step last taken." (Mr. Madison to Mr. Monroe, May 6, 1822, Madison's Writings, III. 267.)

"While Spain maintained a doubtful contest with arms to recover her dominion, it was regarded as a civil war. When that contest became so manifestly desperate that Spanish viceroys, governors, and captain-generals themselves concluded treaties with the insurgents, virtually acknowledging their independence, the United States frankly and unreservedly recognized the fact, without making their acknowledgment the price of any favor to themselves, and although at the hazard of incurring the displeasure of Spain. In this measure they have taken the lead of the whole civilized world; for although the Portuguese-Brazilian Government had a few months before recognized the revolutionary government of Buenos Ayres, it was at a moment when a projected declaration of its own independence made the question substantially their own cause, and it was presented as an equivalent for a reciprocal recognition of their own much more questionable right to the eastern shore of La Plata."

Mr. Adams, Sec. of State, to Mr. Anderson, minister to Colombia, May 27, 1823, MS. Inst. to U. S. Ministers, IX. 274, 282, 283.

In the course of the same instruction, Mr. Adams observed:

"So long as a contest of arms, with a rational or even remote prospect of eventual success, was maintained by Spain, the United States could not recognize the independence of the colonies as existing *de facto* without trespassing on their duties to Spain by assuming as decided that which was precisely the question of the war." (Id., 276, 277.)

"On the 17th of June, 1822, Mr. Manuel Torres was received by the President of the United States as chargé d'affaires from the Republic of Colombia, and the immediate consequence of our recognition was the admission of the vessels of the South American nations, under their own colors, into the ports of the principal maritime nations of Europe."<sup>a</sup>

At the time of its recognition, the Republic of Colombia consisted of what afterwards became the independent States of New Granada, Ecuador, and Venezuela.

Venezuela was formally recognized by the United States as an independent state by the issuance of an exequatur to Mr. Nicholas D. C. Moller, as Venezuelan consul at New York, February 25, 1835.<sup>b</sup>

New Granada was recognized by the issuance of an exequatur to a New Granadian consul-general on September 18, 1835.

Ecuador, by the appointment of Mr. J. C. Pickett, then United States chargé d'affaires to the Peru-Bolivian Confederation, to negotiate a treaty of commerce and navigation, June 15, 1838.<sup>c</sup>

"It does not appear from anything in this office, that any Government under the title of that of 'The United Provinces of Rio de Plata' was ever acknowledged by this. It may be well to state, however, that the same Government, under the title of 'The Government of Buenos Ayres,' was first formally acknowledged or recognized by the Govern-

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<sup>a</sup> Mr. Adams, Sec. of State, to Mr. Anderson, minister to Colombia, May 27, 1823, MS. Inst. to U. S. Ministers, IX. 274, 283.

Mr. Adams, in a letter to Don Pedro Gual, Secretary of State for Foreign Affairs of the Republic of Colombia, of July 2, 1822, stated that Colonel Charles S. Todd, the bearer of the letter, would communicate to him documents exhibiting both the recognition by the United States of the independence of the Republic and the disposition of the former power to enter into friendly relations. With this view, said Mr. Adams, the President had received Mr. Torres in the capacity of chargé d'affaires, with which he was clothed by his Government, and would at an early day appoint some one with a diplomatic character to represent the United States at the seat of the Colombian Government. (MS. Notes to For. Leg. III. 105.)

"In the recognition of the independence of the several governments of South America it is not," said Mr. Adams, "his [the President's] intention, by discriminating between them, with regard to time, to admit any claim to prior recognition, in favor of any one over the other." (Mr. Adams, Sec. of State, to Mr. De Forest, May 23, 1822, MS. Notes to For. Leg. III. 104.)

<sup>b</sup> Mr. McLane, Sec. of State, in an instruction to Mr. Williamson, Nov. 28, 1833, in relation to the claim of Jacob Idler against Venezuela for supplies furnished her during her war of independence, said it was the President's wish that he should afford the claimant all the aid in his power "without committing this Government to a recognition of that of Venezuela." (Brief of Mr. Ashton, counsel for the United States, in the case of Idler v. Venezuela, commission under the convention of Dec. 5, 1885, p. 7.)

<sup>c</sup> Sen. Doc. 40, 54 Cong. 2 Sess. 12, 13.

ment of the United States \* \* \* by the appointment of Mr. Cæsar Rodney, on the 27th January, 1823, as minister plenipotentiary of the United States to that Government, tho' others had before held informal appointments under this Government, to watch over the commercial interests of the citizens of the United States, resorting thither from time to time."<sup>a</sup>

The Government of Buenos Ayres at one time claimed the sovereignty of both Uruguay and Paraguay.

Uruguay was recognized by the United States as an independent State January 25, 1836, by the issuance of an exequatur to Mr. John Darby, as consul-general at New York.

Paraguay was recognized as separate and independent April 27, 1852, by the issuance to Mr. John S. Pendleton, of Virginia, chargé d'affaires at Buenos Ayres, of a full power to negotiate a treaty of commerce with the Paraguayan Government.<sup>b</sup>

"Mr. Henan Allen was appointed minister plenipotentiary of the United States to Chile on the 27th January, 1823, and arrived at Santiago de Chile on the 10th of April, 1824, when he entered upon the duties of his mission."

Chile.  
Mr. Livingston, Sec. of State, to Mr. Wayne, Feb. 25, 1833, 25 MS. Dom. Let. 258.

Mexico was formally recognized on the same day as Buenos Ayres (Argentine Republic) and Chile, viz. January 27, 1823, by the appointment of a minister to that country.

Mexico.

The independence of Brazil was declared September 7, 1822, and on the 1st of the ensuing December Pedro I., son of John VI. of Portugal, was proclaimed as emperor.

Brazil.

The independence of the Empire was recognized by the President's

<sup>a</sup> Mr. Van Buren, Sec. of State, to Mr. Berrien, Sept. 24, 1830, 23 MS. Dom. Let. 482.

The instructions of Mr. Cæsar A. Rodney, as minister to Buenos Ayres, bearing date May 17, 1823, are recorded in MS. Inst. to U. S. ministers, IX. 250.

<sup>b</sup> Sen. Doc. 40, 54 Cong. 2 sess. 12, 13.

"You are aware that it is the settled policy of the United States to recognize the independence of all governments which have manifested to the world that they are *de facto* independent. This duty has been eagerly performed towards our sister Republics on this continent. The information already in our possession, especially that which has been communicated by Mr. Lisboa, would justify this Government in promptly acknowledging the independence of Paraguay. Notwithstanding this information the President has determined to suspend action upon this subject for the present, purely from regard to the Argentine Republic and in consideration of the heroic struggle which it is now maintaining against the armed intervention of Great Britain and France in the concerns of the Republics on the La Plata and its tributaries. He could not give a more striking proof than this of his friendship for the Argentine Republic." (Mr. Buchanan, Sec. of State, to Mr. Harris, U. S. minister, No. 1, March 30, 1846, MS. Inst. Arg. Republic, XV. 19, 21, 22.)

reception of Senhor Rebello as chargé d'affaires to the United States May 26, 1824.

Sen. Doc. 40, 54 Cong. 2 sess. 4; MS. Notes to For. Leg. III. 173; Adams' Memoirs, VI. 354, 355.

"The United States first acknowledged the independence of Brazil. The political form of that Government occasioned no hesitation in its recognition by ours." (Mr. Forsyth, Sec. of State, to Mr. Hunter, Nov. 29, 1836. MS. Inst. to Brazil, XV. 34, 38.)

**Central American States.** "The Federation of Central American States was recognized by the President's reception of Mr. Canaz as envoy extraordinary and minister plenipotentiary August 4, 1824.

Prior to that date two commissioners, diplomatic in character, had visited Washington, but the records of the Department [of State] do not disclose any act of the Government of the United States involving recognition or the intention to recognize. (See Notes to Legations, MSS., vol. 3, p. 184.)

"This Federation consists of the States of Honduras, Guatemala, Nicaragua, Costa Rica, and Salvador."

Report of Mr. Allen, Chief of Bureau of Rolls and Library, Jan. 1, 1897, Sen. Doc. 40, 54 Cong. 2 sess. 5.

In this report the time and manner of the formal recognition by the United States of the various members of the Federation as separate States are given as follows:

Guatemala, April 5, 1844, by the issuance of an exequatur to a Guatemalan consul-general.

Salvador, May 1, 1849, by the issuance of a full power and letter of credence to Mr. E. George Squier, of New York, chargé d'affaires to Guatemala, to negotiate a treaty with Salvador.

Nicaragua, Dec. 24, 1849, by the President's reception of Mr. Eduardo Comacho as Nicaraguan chargé d'affaires.

Costa Rica, March 24, 1851, by the President's reception of Mr. Felipe Molina as Costa Rican charge d'affaires.

Honduras, April 18, 1853, by the dispatch of Mr. Solon Borland as envoy extraordinary and minister plenipotentiary to Honduras, Costa Rica, Nicaragua, and Salvador.

The independence of Peru was recognized by the United States by the appointment of Mr. James Cooley, of Pennsylvania, as chargé d'affaires, May 2, 1826.

**Peru.**

Sen. Doc. 40, 54 Cong. 2 sess. 13.

The Peru-Bolivian Confederation was recognized June 9, 1838, by the appointment of Mr. J. C. Pickett, of Kentucky, as chargé d'affaires.

Bolivia was recognized as a separate State May 30, 1848, by the appointment of Mr. John Appleton, of Maine, as chargé d'affaires.

**British recognition**  
—Buenos Ayres,  
Colombia, Mexico. "The independence of Buenos Ayres, Colombia, and Mexico was recognized by England early in 1825. The recognition of Chile was postponed because of the instability of its internal condition. Both the British Government and the opposition were at one on the question of principle.

The words of Lord Liverpool may be quoted to show the views of Mr. Canning, of Lord Lansdowne, and of Sir James Mackintosh, as well as of himself. 'He had no difficulty,' he said, 'in declaring what had been his conviction during the years that the struggle had been going on between Spain and the South American provinces—that there was no right while the contest was actually going on. \* \* \* The question ought to be—was the contest going on? He, for one, could not reconcile it to his mind to take any such step so long as the struggle in arms continued undecided. And while he made that declaration he meant that it should be a *bona fide* contest?'

"Assuming that the recognition of the Spanish-American Republics by the United States and England may be taken as a typical example of recognition given upon unimpeachable grounds, and bearing in mind the principle that recognition can not be withheld when it has been earned, it may be said generally that—

"1. Definitive independence can not be held to be established, and recognition is consequently not legitimate, so long as a substantial struggle is being maintained by the formerly sovereign state for the recovery of its authority; and that

"2. A mere pretension on the part of the formerly sovereign state, or a struggle so inadequate as to offer no reasonable ground for supposing that success may ultimately be obtained, is not enough to keep alive the rights of the state, and so to prevent foreign countries from falling under an obligation to recognize as a state the community claiming to have become one."

Hall, Int. Law, 4th ed. 90-93.

"In considering that war (between Spain and her colonies), as in considering all others, we should look back upon the past, deliberately survey its present condition, and endeavor, if possible, to catch a view of what is to come. With respect to the first branch of the subject, it is, perhaps, of the least practical importance. No statesman can have contemplated the colonial relations of Europe and continental America without foreseeing that the time must come when they would cease. That time might have been retarded or accelerated, but come it must in the great march of human events. An attempt of the British Parliament to tax without their consent the former British colonies, now these United States, produced the war of our Revolution, and led to the establishment of that independence and freedom which we now so justly prize. Moderation and forbearance on the part of Great Britain might have postponed, but could not have prevented, our ultimate separation. The attempt of Bonaparte to subvert the ancient dynasty of Spain, and to place on its throne a member of his own family, no doubt hastened the independence of the Spanish colonies. If he had not been urged by his ambition to the conquest of the pen-

Good offices, American and European, with Spain.

insula, those colonies, for a long time to come, might have continued quietly to submit to the parental sway. But they must have inevitably thrown it off, sooner or later. We may imagine that a vast continent, uninhabited or thinly peopled by a savage and untutored race, may be governed by a remote country, blessed with the lights and possessed of the power of civilization, but it is absurd to suppose that this same continent, in extent twenty times greater than that of the parent country, and doubling it in a population equally civilized, should not be able, when it chooses to make the effort, to cast off the distant authority. When the epoch of separation between a parent state and its colony, from whatever cause, arrives, the struggle for self-government on the one hand, and for the preservation of power on the other, produces mutual exasperation and leads to a most embittered and ferocious war. It is then that it becomes the duty of third powers to interpose their humane offices, and calm the passions and enlighten the counsels of the parties. And the necessity of their efforts is greatest with the parent country, whose pride and whose wealth and power, swelled by the colonial contributions, create the most repugnance to an acquiescence in a severance which has been ordained by Providence."

Mr. Clay, Sec. of State, to Mr. Middleton, minister to Russia, May 10, 1825, MS. Inst. to U. S. Ministers, X. 331-2; Br. and For. State Papers (1825-1826), XIII. 403.

See also Message of President J. Q. Adams, Feb. 1, 1826, Am. State Papers, V. 794, relative to the intervention of foreign governments to induce Spain to acknowledge the independence of the American governments. This document comprises (1) an instruction of Mr. Clay to Mr. A. H. Everett, April 27, 1825, to urge recognition upon Spain; (2) a report, Sept. 25, 1825, of a conversation on the subject between Mr. Everett and Mr. Zea, the Spanish Minister of State; (3) a report, Oct. 20, 1825, of another conversation, in which Mr. Zea inquired as to the communications made by the United States to Russia, commented on the British and other offers of mediation, and declared the resolution of the King to reject all offers that contemplated the acknowledgment of independence.

In conformity with the views expressed by Mr. Clay in the foregoing extract, the United States sought, by direct representations, as well as by the counsels which it solicited friendly European governments to tender, to induce Spain to recognize the independence of Mexico and of the Central and South American governments. The reasons for this step were elaborately presented in a note addressed by Mr. Alexander H. Everett, then United States minister at Madrid, to the Duke del Infantado, principal secretary of state for foreign affairs, January 20, 1826. In the course of this note Mr. Everett, referring to the great change in the situation of the Spanish-American governments as indicated by the Panama Congress, said: "This change in their position is evidently one of vast consequence. It calls imperiously upon the Spanish Government to consider well the system



upon which it is now proceeding, and to examine anew the whole subject of its relations with these states. It has also been thought, by the Government of the United States, that the occurrence of this remarkable event furnishes an occasion upon which the neutral and friendly powers might, with propriety, renew their good offices in attempts to bring about a reconciliation between the parties to the war. They have been induced by this motive to communicate their opinions and their wishes to His Majesty's ministers in a more formal manner at this time than they have hitherto employed, and to invite the leading powers of Europe to concur with them, as far as they might think it expedient, in the same great and benevolent purpose. France and Portugal have lately led the way in a course of proceeding similar to that which is now recommended to His Catholic Majesty. It only remains for the King to give one signal proof of magnanimity and wisdom in order to complete the pacification of the whole American continent."<sup>a</sup>

In 1830 Mr. Van Ness, when sent as minister to Spain, was enjoined to pursue the course which had been pointed out to several of his predecessors, by availing himself of "every fit opportunity," so far as it might be done without exciting jealousy and irritation, to impress upon the Spanish Government the expediency of recognizing the independence of Spain's former American colonies.<sup>b</sup> Mr. Van Ness is also advised that the diplomatic representative of Mexico in Washington had just stated in an official communication that the British Government had informed that of Mexico that it had taken measures to induce the Spanish Government by friendly advice and remonstrance "to consent to the recognition of the independence of the South American States."

In the autumn of 1834 Mr. Van Ness had the satisfaction of informing his Government that, as the result of its good offices, Spain was ready to enter into negotiations with the Spanish-American states with a view to recognize their independence. A copy of the note of Mr. Martinez de la Rosa, principal secretary of state for foreign affairs, of September 12, 1834, in which this decision was expressed, was communicated by the Department of State to each of the representatives of those states in Washington, with the statement that Mr. Van Ness would be instructed to afford to the commissioners, to whom the negotiations might be entrusted, such good offices with the Spanish Government as might be desirable. Mr. Van Ness was instructed accordingly. He was also directed to guard against any effort on the part of Spain "to obtain, in consideration of her acknowledgment of

Consent of Spain to  
Negotiate; Atti-  
tude of United  
States.

<sup>a</sup> Am. St. Pap., For. Rel., VI. 1007. See also Br. and For. State Papers (1828-1829), XVI. 856; Adams' Memoirs, V. 488-491; Phillimore, Int. Law, 3d ed., II. 545.

<sup>b</sup> Mr. Van Buren, Sec. of State, to Mr. Van Ness, No. 19, Oct. 13, 1830, MS. Inst. to U. S. Ministers, XIII. 184.

the independence of her former colonies, some peculiar advantages in trade, or some extraordinary privileges for her citizens, to the prejudice of other friendly nations." Such an arrangement, it was declared, "would be peculiarly prejudicial to the interests of this country, and would form a just ground of complaint against those whom the Government of the United States was the first to recognize in their independent character, and for whose prosperity it has never ceased to manifest the most friendly and anxious concern."

Mr. Forsyth, Sec. of State, to Mr. Van Ness, No. 69, Nov. 18, 1834, MS. Inst. Spain, XIV. 52; Mr. Forsyth, Sec. of State, to Señor Don J. M. de Castillo y Lanzas, Mexican chargé d'affaires, Nov. 10, 1834, MS. notes to Mex. Leg. VI. 3; same to same, Aug. 21, 1834, Id. VI. 1.

#### 10. TEXAS.

#### § 37.

"The right of one independent power to recognize the fact of the existence of a new power about to assume a position among the nations of the earth is incontestable. It is founded upon another right, that which appertains to every sovereignty, to take care of its own interests by establishing and cultivating such commercial or other relations with the new power as may be deemed expedient. Its exercise gives no just ground of umbrage or cause of war. The policy which has hitherto guided the Government of the United States in respect to new powers has been to act on the fact of their existence, without regard to their origin, whether that has been by the subversion of a pre-existing Government or by the violent or voluntary separation of one from another part of a common nation. In cases where an old and established nation has thought proper to change the form of its Government, the United States, conforming to the rule which has ever governed their conduct, of strictly abstaining from all interference with the domestic concerns of other states, have not stopped to inquire whether the new Government has been rightfully adopted or not. It has been sufficient for them that it is, in fact, the Government of the country, in practical operation. There is, however, a marked difference in the instances of an old nation which has altered the form of its Government and a newly organized power which has just sprung into existence. In the former case (such, for example, as was that of France) the nation had existed for ages as a separate and independent community. It is a matter of history, and the recognition of its new Governments was not necessary to denote the existence of the nation; but with respect to new powers the recognition of their Governments comprehends, first, an acknowledgment of their ability to exist as independent states, and secondly, the capacity of their particular Governments

to perform the duties and fulfill the obligations towards foreign powers incident to their new condition. Hence, more caution and deliberation are necessary in considering and determining the question of the acknowledgment of a new power than that of the new Government of an old power.

“The Government of the United States has taken no part in the contest which has unhappily existed between Texas and Mexico. It has avowed its intention and taken measures to maintain a strict neutrality towards the belligerents. If individual citizens of the United States, impelled by sympathy for those who were believed to be struggling for liberty and independence against oppression and tyranny, have engaged in the contest it has been without the authority of their Government. On the contrary, the laws which have been hitherto found necessary or expedient to prevent citizens of the United States from taking part in foreign wars have been directed to be enforced.

\* \* \*

“The recognition of Texas as an independent power may be made by the United States in various ways: First, by treaty; second, by the passage of a law regulating commercial intercourse between the two powers; third, by sending a diplomatic agent to Texas with the usual credentials; or, lastly, by the Executive receiving and accrediting a diplomatic representative from Texas, which would be a recognition as far as the Executive only is competent to make it. In the first and third modes the concurrence of the Senate in its executive character would be necessary, and in the second in its legislative character.

“The Senate alone, without the cooperation of some other branch of the Government, is not competent to recognize the existence of any power.

“The President of the United States, by the Constitution, has the charge of their foreign intercourse. Regularly he ought to take the initiative in the acknowledgment of the independence of any new power, but in this case he has not yet done it, for reasons which he, without doubt, deems sufficient. If in any instance the President should be tardy, he may be quickened in the exercise of his power by the expression of the opinion, or by other acts, of one or both branches of Congress, as was done in relation to the republics formed out of Spanish America. But the committee do not think that on this occasion any tardiness is justly imputable to the Executive. About three months only have elapsed since the establishment of an independent Government in Texas, and it is not unreasonable to wait a short time to see what its operation will be, and especially whether it will afford those guarantees which foreign powers have a right to expect before they institute relations with it.

“Taking this view of the whole matter, the committee conclude by recommending to the Senate the adoption of the following resolution:

“*Resolved*, That the independence of Texas ought to be acknowledged by the United States whenever satisfactory information shall be received that it has in successful operation a civil government, capable of performing the duties and fulfilling the obligations of an independent power.’”

Report of Mr. Clay, Committee on Foreign Relations, Senate, June 18, 1836,  
Sen. E. Doc. 406, 24 Cong. 1 sess.

“No steps have been taken by the Executive towards the acknowledgment of the independence of Texas, and the whole subject would have been left without further remark on the information now given to Congress, were it not that the two Houses at their last session, acting separately, passed resolutions ‘that the independence of Texas ought to be acknowledged by the United States whenever satisfactory information should be received that it had in successful operation a civil government capable of performing the duties and fulfilling the obligations of an independent power.’ This mark of interest in the question of the independence of Texas, and indication of the views of Congress, make it proper that I should somewhat in detail present the considerations that have governed the Executive in continuing to occupy the ground previously taken in the contest between Mexico and Texas.

“The acknowledgment of a new state as independent, and entitled to a place in the family of nations, is at all times an act of great delicacy and responsibility, but more especially so when such state has forcibly separated itself from another of which it had formed an integral part, and which still claims dominion over it. A premature recognition under these circumstances, if not looked upon as justifiable cause of war, is always liable to be regarded as a proof of an unfriendly spirit to one of the contending parties. All questions relative to the government of foreign nations, whether of the Old or New World, have been treated by the United States as questions of fact only, and our predecessors have cautiously abstained from deciding upon them until the clearest evidence was in their possession to enable them not only to decide correctly, but to shield their decisions from every unworthy imputation. In all the contests that have arisen out of the revolutions of France, out of the disputes relating to the Crowns of Portugal and Spain, out of the separation of the American possessions of both from the European governments, and out of the numerous and constantly occurring struggles for dominion in Spanish America, so wisely consistent with our just principles has been the action of our Government that we have, under the most critical circumstances, avoided all censure, and encountered no other evil than that produced by a transient estrangement of good will in those against whom we have been by force of evidence compelled to decide.

President Jackson's  
Message, Dec. 21,  
1836.

“It has thus made known to the world that the uniform policy and practice of the United States is to avoid all interference in disputes which merely relate to the internal government of other nations, and eventually to recognize the authority of the prevailing party without reference to our particular interests and views or to the merits of the original controversy. Public opinion here is so firmly established and well understood in favor of this policy that no serious disagreement has ever risen among ourselves in relation to it, although brought under view in a variety of forms, and at periods when the minds of the people were greatly excited by the agitation of topics purely domestic in their character. Nor has any deliberate inquiry ever been instituted in Congress, or in any of our legislative bodies, as to whom belonged the power of originally recognizing a new state. A power the exercise of which is equivalent, under some circumstances, to a declaration of war; a power nowhere especially delegated, and only granted in the Constitution as it is necessarily involved in some of the great powers given to Congress—in that given to the President and Senate to form treaties with foreign powers, and to appoint ambassadors and other public ministers, and in that conferred upon the President to receive ministers from foreign nations.

“In the preamble to the resolution of the House of Representatives, it is distinctly intimated that the expediency of recognizing the independence of Texas should be left to the decision of Congress. In this view, on the ground of expediency, I am disposed to concur; and do not, therefore, consider it necessary to express any opinion as to the strict constitutional right of the Executive, either apart from or in conjunction with the Senate, over the subject. It is to be presumed that on no future occasion will a dispute arise, as none has heretofore occurred, between the Executive and the legislature in the exercise of the power of recognition. It will always be considered consistent with the spirit of the Constitution, and most safe, that it should be exercised, when probably leading to war, with a previous understanding with that body by whom war can alone be declared, and by whom all the provisions for sustaining its perils must be furnished. Its submission to Congress, which represents in one of its branches the States of the Union, and in the other the people of the United States, where there may be reasonable ground to apprehend so grave a consequence, would certainly afford the fullest satisfaction to our own country, and a perfect guarantee to all other nations of the justice and prudence of the measures which might be adopted.

“In making these suggestions, it is not my purpose to relieve myself from the responsibility of expressing my own opinions of the course the interests of our country prescribe, and its honor permits us to follow.

“It is scarcely to be imagined that a question of this character could

be presented, in relation to which it would be more difficult for the United States to avoid exciting the suspicion and jealousy of other powers, and maintain their established character for fair and impartial dealing. But on this, as on every other trying occasion, safety is to be found in a rigid adherence to principle.

“In the contest between Spain and the revolted colonies we stood aloof, and waited not only until the ability of the new states to protect themselves was fully established, but until the danger of their being again subjugated had entirely passed away. Then, and not until then, were they recognized. Such was our course in regard to Mexico herself. The same policy was observed in all the disputes growing out of the separation into distinct Governments of those Spanish-American States, who began or carried on the contest with the parent country, united under one form of government. We acknowledged the separate independence of New Grenada, of Venezuela, and of Ecuador, only after their independent existence was no longer a subject of dispute, or was actually acquiesced in by those with whom they had been previously united. It is true that with regard to Texas the civil authority of Mexico has been expelled, its invading army defeated, the chief of the Republic himself captured, and all present power to control the newly organized Government of Texas annihilated within its confines. But, on the other hand, there is, in appearance at least, an immense disparity of physical force on the side of Texas. The Mexican Republic, under another Executive, is rallying its forces under a new leader, and menacing a fresh invasion to recover its lost dominion.

“Upon the issue of this threatened invasion, the independence of Texas may be considered as suspended; and were there nothing peculiar in the relative situation of the United States and Texas, our acknowledgment of its independence at such a crisis could scarcely be regarded as consistent with that prudent reserve with which we have hitherto held ourselves bound to treat all similar questions. But there are circumstances in the relations of the two countries which require us to act on this occasion with even more than our wonted caution. Texas was once claimed as a part of our property, and there are those among our citizens who, always reluctant to abandon that claim, cannot but regard with solicitude the prospects of the reunion of the territory to this country. A large portion of its civilized inhabitants are emigrants from the United States, speak the same language with ourselves, cherish the same principles, political and religious, and are bound to many of our citizens by ties of friendship and kindred blood; and, more than all, it is known that the people of that country have instituted the same form of government with our own, and have, since the close of your last session, openly resolved, on the acknowledgment by us of their independence, to seek admission into the Union as one of the Federal States. This last circumstance is a matter of peculiar delicacy, and

forces upon us considerations of the gravest character. The title of Texas to the territory she claims is identified with her independence; she asks us to acknowledge that title to the territory, with an avowed design to treat immediately of its transfer to the United States. It becomes us to beware of a too early movement, as it might subject us, however unjustly, to the imputation of seeking to establish the claim of our neighbors to a territory, with a view to its subsequent acquisition by ourselves. Prudence, therefore, seems to dictate that we should still stand aloof, and maintain our present attitude, if not until Mexico itself, or one of the great foreign powers, shall recognize the independence of the new Government, at least until the lapse of time or the course of events shall have proved beyond cavil or dispute the ability of the people of that country to maintain their separate sovereignty and to uphold the Government constituted by them. Neither of the contending parties can justly complain of this course. By pursuing it, we are but carrying out the long-established policy of our Government, a policy which has secured to us respect and influence abroad and inspired confidence at home."

President Jackson, Texas message, Dec. 21, 1836.

By the act "making appropriations for the civil and diplomatic expenses of Government," which was approved by the President March 3, 1837, provision was made "for the outfit and salary of a diplomatic agent to be sent to the Republic of Texas, whenever the President of the United States may receive satisfactory evidence that Texas is an independent power, and shall deem it expedient to appoint such minister."<sup>a</sup>

**Appropriation by Congress.**

The independence of Texas was recognized March 7, 1837, by the appointment of Mr. Alcée La Branche as chargé d'affaires to that Republic. More than two months had elapsed when his commission was transmitted to him.<sup>b</sup> By his instructions, which were not sent to him till the end of July, he was directed, on his presentation to the President of Texas, to advert in a brief oral address to the purposes of his mission and to assure the President of the desire of the United States to establish the relations between the two countries on the basis of mutual advantage. He was to do everything in his power to cultivate the best understanding with Texas. On the first favorable opportunity he was to present the claims of citizens of the United States who had suffered injury from the Texan Government or its officials. The only cases of that description for the prosecution of which the aid of the United States had then been solicited were those of the brig *Pocket* and the brig *Durango*. The

**Act of Recognition.**

<sup>a</sup> 5 Stat. 163, 170.

<sup>b</sup> Mr. Forsyth, Sec. of State, to Mr. La Branche, May 21, 1837, MS. Inst. to Texas, I. 1.

former, which sailed from New Orleans March 28, 1836, for Matamoros was taken on the voyage by the armed schooner *Invincible*, sailing under the Texan flag and commanded by one Brown, carried to Galveston, and there, with her cargo, condemned and appropriated without trial by persons claiming to act under the authority of Texas. The *Durango* was seized in Matagorda Bay March 22, 1836, by an armed force under orders of John A. Wharton, adjutant-general of Texas, and Brown, commander of the *Invincible*. The brig was abandoned by her master.<sup>a</sup> Numerous instructions were afterwards given in relation to the pursuit of Indians by the Texans into the United States.

“The undersigned \* \* \* has had the honor to receive the note of Mr. J. M. de Castillo y Lanzas, chargé d'affaires of Mexico, of the 8th instant, protesting against the appointment by the late Executive of the United States of a diplomatic agent to Texas.

Reply to Mexican  
Protest.

“Mr. Castillo's impression as to the incompatibility of that act with the views of the late Executive on the subject of the contest in Texas, as disclosed in his message to Congress, must have been removed if he had reflected on the circumstance that the two branches of the legislative department of the Government, to which the subject has been referred by the late President, concurred as to its propriety.

“The independence of other nations has always been regarded by the United States as a question of fact merely, and that of every people has been invariably recognized by them whenever the actual enjoyment of it was accompanied by satisfactory evidence of their power and determination permanently and effectually to maintain it. This was the course pursued by the United States in acknowledging the independence of Mexico and the other American States, formerly under the dominion of Spain. The United States, in recognizing Texas, acted in perfect accordance with their ordinary and settled policy. That act, however, did not proceed from any unfriendly spirit towards Mexico, and must not be regarded as indicative of a disposition to interfere in the contest between her and Texas.

“While it is the determination of the Executive to do everything within the scope of his authority to maintain the neutrality of the United States with respect to both those countries, he trusts that the recognition of Texas will not be allowed by Mexico to inspire a doubt of his hearty desire to preserve and improve the relations of amity with her, so far as this can be done consistently with the rights and honor of the United States.

Mr. Forsyth, Sec. of State, to Mr. Castillo, March 17, 1837, MS. Notes to Mex. Leg. VI. 71.

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<sup>a</sup> Mr. Forsyth, Sec. of State, to Mr. La Branche, July 22, 1837, MS. Inst., Texas, I. 1.



A copy of this note was sent by Mr. Forsyth, May 22, 1837, to Mr. J. M. Ortiz Monasterio, acting minister of foreign affairs of the Republic of Mexico, who had on the 31st of March addressed to the United States a direct protest against the recognition. (MS. Notes to the Mex. Leg. VI. 77.)

As to the state of the relations between the United States and Mexico at the time of the recognition of Texas, see Int. Arbitrations, II. 1212-1215.

The action of the United States in recognizing Texas is discussed by Sir W. Vernon Harcourt as a precedent for the position "that recognition is not permissible until the contest is won." (Historicus, 19.)

#### 11. CASE OF THE CONFEDERATE STATES.

#### § 38.

"You are, of course, aware that the election last November resulted in the choice of Mr. Abraham Lincoln; that he was **Circular of Mr. Black.** the candidate of the Republican or Antislavery party; that the preceding discussion had been confined almost entirely to topics connected, directly or indirectly, with the subject of negro slavery; that every Northern State cast its whole electoral vote (except three in New Jersey) for Mr. Lincoln, while in the whole South the popular sentiment against him was almost absolutely universal. Some of the Southern States, immediately after the election, took measures for separating themselves from the Union, and others soon followed their example. Conventions have been called in South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas, and those conventions, in all except the last-named State, have passed ordinances declaring their secession from the Federal Government. A congress, composed of representatives from the six first-named States, has been assembled for some time at Montgomery, Ala. By this body a provisional constitution has been framed for what it styles the 'Confederated States of America.'

"It is not improbable that persons claiming to represent the States which have thus attempted to throw off their Federal obligations will seek a recognition of their independence by the Emperor of Russia. In the event of such an effort being made, you are expected by the President to use such means as may in your judgment be proper and necessary to prevent its success.

"The reasons set forth in the President's message at the opening of the present session of Congress in support of his opinion that the States have no constitutional power to secede from the Union are still unanswered and are believed to be unanswerable. The grounds upon which they have attempted to justify the revolutionary act of severing the bonds which connect them with their sister States are regarded as wholly insufficient. This Government has not relinquished its constitutional jurisdiction within the territory of those States, and does not desire to do so.

"It must be very evident that it is the right of this Government to ask of all foreign powers that the latter shall take no steps which may tend to encourage the revolutionary movement of the seceding States or increase the danger of disaffection in those which still remain loyal. The President feels assured that the Government of the Emperor will not do anything in these affairs inconsistent with the friendship which this Government has always heretofore experienced from him and his ancestors. If the independence of the 'Confederated States' should be acknowledged by the great powers of Europe, it would tend to disturb the friendly relations, diplomatic and commercial, now existing between those powers and the United States. All these are consequences which the court of the Emperor will not fail to see are adverse to the interests of Russia as well as to those of this country.

"Your particular knowledge of our political institutions will enable you to explain satisfactorily the causes of our present domestic troubles and the grounds of the hope still entertained that entire harmony will soon be restored."

Mr. Black, Sec. of State, to all the ministers of the United States, Circular, Feb. 28, 1861, Dip. Cor. 1861, 31.

"My predecessor, in his dispatch, No. 10, addressed to you on the Mr. Seward's Cir- 28th of February last, instructed you to use all proper  
cular. and necessary measures to prevent the success of efforts which may be made by persons claiming to represent those States of this Union, in whose name a provisional Government has been announced, to procure a recognition of their independence by the Government of Spain.

"I am now instructed by the President of the United States to inform you that, having assumed the administration of the Government in pursuance of an unquestioned election and of the directions of the Constitution, he renews the injunction which I have mentioned, and relies upon the exercise of the greatest possible diligence and fidelity on your part to counteract and prevent the designs of those who would invoke foreign intervention to embarrass or overthrow the Republic.

"When you reflect on the novelty of such designs, their unpatriotic and revolutionary character, and the long train of evils which must follow directly or consequentially from even their partial or temporary success, the President feels assured that you will justly appreciate and cordially approve the caution which prompts this communication.

"I transmit herewith a copy of the address pronounced by the President on taking the constitutional oath of office. It sets forth clearly the errors of the misguided partisans who are seeking to dismember the Union, the grounds on which the conduct of those partisans is disallowed, and also the general policy which the Government will

pursue with a view to the preservation of domestic peace and order, and the maintenance and preservation of the Federal Union.

"You will lose no time in submitting this address to the Spanish minister of foreign affairs, and in assuring him that the President of the United States entertains a full confidence in the speedy restoration of the harmony and unity of the Government by a firm, yet just and liberal, bearing, cooperating with the deliberate and loyal action of the American people.

"The United States have had too many assurances and manifestations of the friendship and good will of Her Catholic Majesty to entertain any doubt that these considerations, and such others as your large experience of the working of our Federal system will suggest, will have their just influence with her, and will prevent Her Majesty's Government from yielding to solicitations to intervene in any unfriendly way in the domestic concerns of our country."

Mr. Seward, Sec. of State, circular to all the ministers of the United States, March 9, 1861, Dip. Cor. 1861, 32; MS. Inst. Spain.

The legation of the United States at Madrid reported, April 22, 1861, the assurance of Mr. Calderon that no commissioners from the Confederacy had then applied for its recognition, and that no negotiations for that purpose would be conducted without full information being given to the representative of the United States. Mr. Seward pronounced "this engagement \* \* \* quite satisfactory." (Mr. Seward, Sec. of State, to Mr. Perry, May 20, 1861, MS. Inst. Spain, XV. 272.)

**Failure of Attempts to Obtain Recognition.** "To recognize the independence of a new state, and so favor, possibly determine, its admission into the family of nations, is the highest possible exercise of sovereign power, because it affects in any case the welfare of two nations, and often the peace of the world. In the European system this power is now seldom attempted to be exercised without invoking a consultation or congress of nations. That system has not been extended to this continent. But there is even a greater necessity for prudence in such cases in regard to American states than in regard to the nations of Europe. A revolutionary change of dynasty, or even a disorganization and recombination of one or many states, therefore, do not long or deeply affect the general interest of society, because the ways of trade and habits of society remain the same. But a radical change effected in the political combinations existing on the continent, followed, as it probably would be, by moral convulsions of incalculable magnitude, would threaten the stability of society throughout the world.

"Humanity has, indeed, little to hope for if it shall, in this age of high improvement, be decided without a trial that the principle of international law which regards nations as moral persons, bound so to act as to do to each other the least injury and the most good, is merely

an abstraction too refined to be reduced into practice by the enlightened nations of western Europe. Seen in the light of this principle, the several nations of the earth constitute one great Federal Republic. When one of them casts its suffrages for the admission of a new member into that Republic, it ought to act under a profound sense of moral obligation, and be governed by considerations as pure, disinterested, and elevated as the general interest of society and the advancement of human nature.

"The British Empire itself is an aggregation of divers communities which cover a large portion of the earth and embrace one-fifth of its entire population. Some, at least, of these communities are held to their places in that system by bonds as fragile as the obligations of our own Federal Union. The strain will some time come which is to try the strength of these bonds, though it will be of a different kind from that which is trying the cords of our confederation. Would it be wise for Her Majesty's Government, on this occasion, to set a dangerous precedent or provoke retaliation? If Scotland and Ireland are at last reduced to quiet contentment, has Great Britain no dependency, island, or province left exposed along the whole circle of her Empire, from Gibraltar through the West Indies and Canada till it begins again on the southern extremity of Africa?"

Mr. Seward, Sec. of State, to Mr. Adams, minister to England, April 10, 1861, Dip. Cor. 1861, 71, 79.

Oct. 25, 1862, Mr. Seward instructed Mr. Adams, with reference to a negotiation then pending that "if the extra-official speeches of members of the Cabinet must be taken . . . to indicate an approaching act of recognition of the insurgents in derogation of the sovereignty of the United States, that circumstance will most necessarily now be taken into consideration;" and that if the question how such a recognition would affect the action of the United States with reference to the negotiation should officially arise, Mr. Adams would "in that case state promptly and without reserve to Earl Russell, that all negotiations for treaties of whatever kind between the two governments will be discontinued whenever the complete and unbroken sovereignty of the American Republic shall be denied by the Government of Great Britain." (MS. Inst. Gr. Britain, XVIII. 331.)

Sir G. C. Lewis "is supposed to have maintained that England would not be entitled to recognize the Southern Confederacy until the Federalists had previously done so. But the secretary of war is far too accurate a thinker and speaker to have laid down any such doctrine. The rule he propounded was precisely that acted on by Mr. Canning in the case of the South American Republics, viz, that where a doubtful and *bona fide* struggle for supremacy is still maintained by the sovereign power, the insurgents *jam flagrante bello* can not be said to have established a *de facto* independence." (Historicus, 8.)

A report in 1864 that "a person in Montreal" had in his possession "a recognition of the so-called Southern Confederacy by the Pope written on parchment," led Mr. Seward, though he considered the report "incredible in itself, and improbable from circumstances attending it," to instruct Mr. King, then minister to the Papal States, to make "a categorical

inquiry" of Cardinal Antonelli, and if, "contrary to any reasonable expectation," the report should be confirmed, to express regret at the proceeding, which must "compel a suspension at least of diplomatic intercourse," and to that end to request his passports and retire to Switzerland, or such other quarter as he might think proper, and there await further instructions. The reply of Mr. King "satisfactorily disposed of the rumors." (Mr. Seward, Sec. of State, to Mr. King, July 19, 1864, MS. Inst. Papal States, I. 78; same to same, Sept. 21, 1864, id. 80.)

## 12. HAYTI AND SANTO DOMINGO.

### § 39.

President Lincoln, in his annual message of December 3, 1861, expressed the opinion that the independence of Hayti should be recognized, and suggested to Congress the expediency of providing for a *chargé d'affaires* to that country. By the act of June 5, 1862, the President was authorized to appoint a "diplomatic representative," who was to be accredited as commissioner and consul-general.

July 12, 1862, Mr. Benjamin F. Whidden was commissioned to act in that capacity.

The Dominican Republic was recognized September 17, 1866, on which day an *exequatur* was issued to Mr. J. W. Currier as Dominican consul-general at New York.

## 13. CASE OF CUBA.

### § 40.

"Where a considerable body of people, who have attempted to free themselves of the control of the superior government, have reached such point in occupation of territory, in power, and in general organization as to constitute in fact a body politic, having a government in substance as well as in name, possessed of the elements of stability, and equipped with the machinery for the administration of internal policy and the execution of its laws, prepared and able to administer justice at home, as well as in its dealing with other powers, it is within the province of those other powers to recognize its existence as a new and independent nation. In such cases other nations simply deal with an actually existing condition of things, and recognize as one of the powers of the earth that body politic which, possessing the necessary elements, has, in fact, become a new power. In a word, the creation of a new state is a fact.

"To establish the condition of things essential to the recognition of this fact, there must be a people occupying a known territory, united under some known and defined form of government, acknowledged by those subject thereto, in which the functions of government are administered by usual methods, competent to mete out justice to

citizens and strangers, to afford remedies for public and for private wrongs, and able to assume the correlative international obligations and capable of performing the corresponding international duties resulting from its acquisition of the rights of sovereignty. A power should exist complete in its organization, ready to take and able to maintain its place among the nations of the earth.

“While conscious that the insurrection in Cuba has shown a strength and endurance which make it at least doubtful whether it be in the power of Spain to subdue it, it seems unquestionable that no such civil organization exists which may be recognized as an independent government capable of performing its international obligations and entitled to be treated as one of the powers of the earth. A recognition under such circumstances would be inconsistent with the facts, and would compel the power granting it soon to support by force the government to which it had really given its only claim to existence. In my judgment, the United States should adhere to the policy and the principles which have heretofore been its sure and safe guides in like contests between revolted colonies and their mother country, and, acting only upon the clearest evidence, should avoid any possibility of suspicion or of imputation.”

President Grant, seventh annual message, December 7, 1875.

“The insurrection in Cuba [that broke out in February, 1895] still continues, with all its perplexities. \* \* \* If Spain has not yet reestablished her authority, neither have the insurgents yet made good their title to be regarded as an independent state. Indeed, as the contest has gone on, the pretense that civil government exists on the island, except so far as Spain is able to maintain it, has been practically abandoned. Spain does keep on foot such a government, more or less imperfectly, in the large towns and their immediate suburbs. But, that exception being made, the entire country is either given over to anarchy or is subject to the military occupation of one or the other party. \* \* \* It has been and is now sometimes contended that the independence of the insurgents should be recognized. But imperfect and restricted as the Spanish government of the island may be, no other exists there, unless the will of the military officer in temporary command of a particular district can be dignified as a species of government.”

President Cleveland, annual message, December 7, 1896.

“Turning to the question of recognizing at this time the independence of the present insurgent government in Cuba, we find safe precedents in our history from an early day. They are well summed up in President Jackson’s message to Congress, December 21, 1836, on the subject

President McKin-  
ley’s Message,  
April 11, 1898.

of the recognition of the independence of Texas. \* \* \* These are the words of the resolute and patriotic Jackson. They are evidence that the United States, in addition to the test imposed by public law as the condition of the recognition of independence by a neutral state (to wit, that the revolted state shall 'constitute in fact a body politic, having a government in substance as well as in name, possessed of all the elements of stability,' and forming *de facto*, 'if left to itself, a state among the nations, reasonably capable of discharging the duties of a state'), has imposed for its own governance in dealing with cases like these the further condition that recognition of independent statehood is not due to a revolted dependency until the danger of its being again subjugated by the parent state has entirely passed away.

"This extreme test was, in fact, applied in the case of Texas. The Congress to whom President Jackson referred the question as one 'probably leading to war,' and therefore a proper subject for 'a previous understanding with that body by whom war can alone be declared and by whom all the provisions for sustaining its perils must be furnished,' left the matter of the recognition of Texas to the discretion of the Executive, providing merely for the sending of a diplomatic agent when the President should be satisfied that the Republic of Texas had become 'an independent state.' It was so recognized by President Van Buren, who commissioned a *chargé d'affaires* March 7, 1837, after Mexico had abandoned an attempt to reconquer the Texan territory, and when there was at the time no bona fide contest going on between the insurgent province and its former sovereign.

"I said in my message of December last, 'It is to be seriously considered whether the Cuban insurrection possesses beyond dispute the attributes of statehood which alone can demand the recognition of belligerency in its favor.' The same requirement must certainly be no less seriously considered when the graver issue of recognizing independence is in question, for no less positive test can be applied to the greater act than to the lesser; while, on the other hand, the influences and consequences of the struggle upon the internal policy of the recognizing state, which form important factors when the recognition of belligerency is concerned, are secondary, if not rightly eliminable, factors when the real question is whether the community claiming recognition is or is not independent beyond peradventure.

"Nor from the standpoint of expediency do I think it would be wise or prudent for this Government to recognize at the present time the independence of the so-called Cuban Republic. Such recognition is not necessary in order to enable the United States to intervene and pacify the island. To commit this country now to the recognition of any particular government in Cuba might subject us to embarrassing conditions of international obligation toward the organization so recognized. In case of intervention our conduct would be subject to the approval or disapproval of such government. We would be

require to submit to its direction and to assume to it the mere relation of a friendly ally.

"When it shall appear hereafter that there is within the island a government capable of performing the duties and discharging the functions of a separate nation, and having, as a matter of fact, the proper forms and attributes of nationality, such government can be promptly and readily recognized and the relations and interests of the United States with such nation adjusted."

President McKinley, special message, April 11, 1898, H. Ex. Doc. 405, 55 Cong. 2 sess., 8-10. "Both the legislative and executive branches of the government concurred in not recognizing the existence of any such government as the Republic of Cuba." (*Neely v. Henkle* (1901), 180 U. S. 109, 125.)

The joint resolution of Congress approved April 20, 1898, declaring the people of Cuba to be free and independent, and **Joint Resolution, April 20, 1898.** directing the President to use the Army and Navy for the purpose of causing the withdrawal of the Government of Spain from the island,<sup>a</sup> is given hereafter in the chapter on "Intervention." The independent government of the Republic of Cuba was formally installed May 19, 1902.

#### 14. RECOGNITION OF EUROPEAN STATES.

##### § 41.

By the congress of Vienna Belgium and Holland were united, the Belgic provinces being placed under the sovereignty of the King of the Netherlands.<sup>b</sup> In September, 1830, the Belgians declared their independence. October 14, 1831, the plenipotentiaries of Austria, France, Great Britain, Prussia, and Russia, in conference at London, agreed upon twenty-four articles as a basis of a definite arrangement between the two countries. This arrangement was not accepted by the Netherlands, and on November 15, 1831, the plenipotentiaries above mentioned, together with a plenipotentiary of the King of the Belgians, signed at London a treaty by which it was agreed that Belgium should form "an independent and perpetually neutral State."<sup>c</sup> The United States recognized the independence of Belgium by issuing an exequatur to the Belgian consul at New York January 6, 1832.

September 30, 1825, the British Government issued a proclamation of neutrality with reference to the contest in which the Ottoman Porte and Greece had been "for some years past engaged."<sup>d</sup> By a protocol signed at St. Petersburg March 23/

<sup>a</sup> 30 Stat. 738.

<sup>b</sup> Hertslet's Map of Europe by Treaty, I. 40, 37, 248.

<sup>c</sup> Hertslet, Map of Europe by Treaty, II. 858, 863, 980. The treaty of 1831 was superseded by the treaty of April 19, 1839, id. 979.

<sup>d</sup> Hertslet, Map of Europe by Treaty, I. 731.



April 4, 1826, Great Britain and Russia agreed to offer their mediation on the basis of the recognition of Greece as a tributary dependency by the Ottoman Porte.<sup>a</sup> By a treaty signed at London July 6, 1827, Great Britain, France, and Russia agreed to offer their mediation to Turkey on the same basis, and coincidentally to make to the contending parties a demand for an immediate armistice, as a preliminary and indispensable condition to the opening of any negotiations.<sup>b</sup> The independence of Greece was further guaranteed by an agreement between the same powers December 12, 1828.<sup>c</sup> Meanwhile war had broken out between Russia and Turkey, and on September 9, 1829, the Porte adhered to the treaty of London of July 6, 1827, and declared that it would subscribe to all the decisions which the London conference should adopt.<sup>d</sup> By Art. IX. of the treaty of peace with Russia signed at Adrianople September 14, 1829, Turkey adhered to the protocol adopted by the London conference on the 22d of the preceding March, by which the independence of Greece was guaranteed, under the suzerainty of the Porte.<sup>e</sup> By a convention signed at London May 7 1832, between Great Britain, France, and Russia on the one part and Bavaria on the other, the former powers, "duly authorized for this purpose by the Greek nation," offered the crown of Greece to Prince Frederick Otho of Bavaria, second son of the King of Bavaria, who accepted it in behalf of his son, then a minor.<sup>f</sup>

"The undersigned Secretary of State of the United States has the honor to acknowledge the receipt of a note signed by the ministers plenipotentiary of Great Britain, France and Russia dated the 18th of April instant.

"By this note the said ministers plenipotentiary are pleased to communicate to the Government of the United States that the courts of Great Britain, France and Russia, contracting parties to the public acts by which Greece has been constituted an independent state, and duly authorized by the Greek nation, have called to the sovereignty of this new state, the Prince Otho of Bavaria, and that this prince has taken the title of King of Greece by virtue of this arrangement, that in pursuance of a convention, signed the 7th of May last, and ratified on the 30th of June following by His Imperial Majesty the Emperor of all the Russias and their Majesties the Kings of Great Britain and of France and by the King of Bavaria, as tutor of his son, the Prince Otho, the three courts by which the said ministers plenipotentiary are accredited to the Government of the United States had engaged to request from other Governments the recognition of Prince Otho as King of Greece and that in accordance with this stipulation, the said

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<sup>a</sup> Hertslet, Map of Europe by Treaty, I. 741.

<sup>b</sup> Id. I. 769.

<sup>c</sup> Id. II. 798.

<sup>d</sup> Id. II. 812.

<sup>e</sup> Id. II. 804.

<sup>f</sup> Id. II. 893.

ministers plenipotentiary had received instructions, simultaneously and in common to invite, as by said note they do invite, the Government of the United States to acknowledge the Prince Otho of Bavaria as King of Greece.

"This note has been laid before the President of the United States, who has directed the undersigned to inform the ministers plenipotentiary of the said three powers that it has been the principle, and the invariable practice of the United States to recognize that as the legal government of another nation, which, by its establishment in the actual exercise of political power might be supposed to have received the express or implied assent of the people, and that he is therefore happy that the assurance given by the three mediating powers, that they were duly authorized to make the arrangement they announce, by the people of Greece, will enable him on the part of the United States, without departing from their known principles in similar cases, to acknowledge the Prince Otho of Bavaria, as the King of Greece, and to comply with the request of the high mediating powers, on his reception by the people of that country as their sovereign."

Mr. Livingston, Sec. of State, to Sir Charles R. Vaughan, Mr. Serurier, and Baron de Krudener, envoys extraordinary and ministers plenipotentiary of Great Britain, France, and Russia, April 30, 1833, MS. Notes to For. Leg., V. 101.

November 7, 1837, the United States formally acknowledged the independence of Greece by empowering Mr. Stevenson, then minister at London, to negotiate with that power a treaty of commerce and navigation. Such a treaty was signed at London December 10/22, 1837, Mr. Tricoupi, then Greek plenipotentiary at that capital, representing the Government of Greece.

In 1848 a general parliament met at Palermo, Sicily, which then formed part of the Kingdom of the Two Sicilies, declared  
*Case of Sicily.* the Bourbons dethroned, adopted a constitution, and elected the Duke of Genoa, son of the Sardinian King, as King of Sicily. The consul of the United States at Palermo, on receiving notice of the facts from the minister of foreign affairs of the new Government, at once recognized "the nationality and independence of Sicily on the part of the United States." About a month afterwards the Sicilian minister of foreign affairs wrote to the consul, and, observing that he had seen in the official journal of Naples a notice that the newly appointed consul of the United States at Messina had obtained an exequatur from the Neapolitan Government, stated that "a commission presented to, and rendered executory by, a government foreign to Sicily" could not be of any avail there.

The Department of State, when advised of the consul's action, did not immediately answer, since it supposed that his "recognition of

the independence of the Sicilian Government, being a mere nullity in itself, would pass away and be forgotten." But when it learned that the minister of foreign affairs of the new Government viewed the matter in a different light, it decided that a longer silence would be improper, and instructed the consul as follows:

"It is very true that the Government of the United States has, from its origin, always recognized *de facto* governments as soon as they have clearly manifested their ability to maintain their independence. We do not go behind the existing government to involve ourselves in the question of legitimacy.

"But what authority is to recognize upon the application of these principles to a new government claiming to exist over an island which constituted an integral part of the dominions of a sovereign with whom our relations are of a friendly character? This act of high sovereign power certainly can not, without instructions, be performed by a consul, whose functions are purely commercial; and he ought never under any conceivable circumstances to assume such a high responsibility."

Mr. Buchanan, Sec. of State, to Mr. Marston, consul at Palermo, Oct. 31, 1848, 10 MS. Desp. to consuls, 489; replying to dispatches of Mr. Marston of July 11, and Aug. 28, 1848, 2 MS. Consular Letters, Palermo, 1839-1849.

"My purpose, as freely avowed in this correspondence, was to have acknowledged the independence of Hungary had she succeeded in establishing a government *de facto* on a basis sufficiently permanent in its character to have justified me in doing so, according to the usages and settled principles of this Government; and although she is now fallen, and many of her gallant patriots are in exile or in chains, I am free still to declare that had she been successful in the maintenance of such a government as we could have recognized, we should have been the first to welcome her into the family of nations."

President Taylor, special message, Mar. 28, 1850.

"In the course of the year 1848 and the early part of 1849 a considerable number of Hungarians came to the United States. Among them were individuals representing themselves to be in the confidence of the revolutionary government, and by these persons the President was strongly urged to recognize the existence of that government. In these applications, and in the manner in which they were viewed by the President, there was nothing unusual; still less was there anything unauthorized by the law of nations. It is the right of every independent state to enter into friendly relations with every other independent state. Of course, questions of prudence naturally arise in reference to new states brought by successful revolutions into the

family of nations; but it is not to be required of neutral powers that they should await the recognition of the new government by the parent state. No principle of public law has been more frequently acted upon within the last thirty years by the great powers of the world than this. Within that period eight or ten new states have established independent governments within the limits of the colonial dominions of Spain on this continent; and in Europe the same thing has been done by Belgium and Greece. The existence of all these governments was recognized by some of the leading powers of Europe, as well as by the United States, before it was acknowledged by the states from which they had separated themselves.

"If, therefore, the United States had gone so far as formally to acknowledge the independence of Hungary, although, as the event has proved, it would have been a precipitate step, and one from which no benefit would have resulted to either party, it would not, nevertheless, have been an act against the law of nations, provided they took no part in her contest with Austria."

Mr. Webster, Sec. of State, to Mr. Hülsemann, Austrian chargé d'affaires,  
Dec. 21, 1850, MS. Notes, German States.

Notice of the declaration of independence of Roumania, pronounced by the National Assembly, with the approval and concurrence of Prince Charles, was sent abroad by that Government through diplomatic channels May 22/June 3, 1877. The independence of the principality was recognized by the treaty of Berlin July 13, 1878, subject to certain conditions. The Prince assumed the title of Royal Highness in September, 1878. February 20, 1880, the British, French, and German representatives at Bucharest presented to the Government identic notes recognizing the independence of the principality; and on March 26, 1881, the Prince, in conformity with the action of the Chambers in proclaiming Roumania a kingdom, assumed the title of King.<sup>a</sup> "So far as the Executive Government of the United States could recognize that of Roumania without actual diplomatic representation, it was done by the letter of the President of August 15, 1878, to Prince Charles, touching the appointment of Mr. Timothy C. Smith as consul of this Government at Galatz;" and "nothing" seemed to be "wanting to the full establishment of relations \* \* \* but the desired action of Congress," which the President had already invoked, for the purpose of providing for diplomatic representation.<sup>b</sup> By the act of May 14, 1880,<sup>c</sup> a salary was

<sup>a</sup> Hertslet, Map of Europe by Treaty, IV. 2628, 2790; For. Rel. 1880, 52; id. 1881, 979.

<sup>b</sup> Mr. Evarts, Sec. of State, to Mr. Kasson, minister to Austria-Hungary, March 9, 1880, For. Rel. 1880, p. 51.

<sup>c</sup> 21 Stat. 133, 134.

appropriated for "a diplomatic agent and consul-general at Bucharest," and Mr. Eugene Schuyler was so commissioned June 11, 1880. In his instructions it was stated that he was accredited to the person of the Roumanian sovereign, and that his mission was to be considered a legation; and on the strength of this assurance he was provisionally recognized as possessing a diplomatic character. President Hayes, in his annual message of December 6, 1880, stated that the Government of the United States had sent a "diplomatic representative" to Bucharest, and had received at Washington the special envoy who had "been charged by His Royal Highness Prince Charles to announce the independent sovereignty of Roumania." This special envoy was Colonel Voinesco. He was instructed to represent to the United States that as the title of "diplomatic agent" imparted no definite rank, Mr. Schuyler could in strictness be considered as holding only a consular position, and that he should be invested with "a title corresponding exactly to the character of his mission."<sup>a</sup> By the act of Congress of February 24, 1881, Mr. Schuyler's diplomatic rank was fixed as that of *chargé d'affaires*.<sup>b</sup>

When the principality of Roumania was proclaimed a kingdom the latter was promptly recognized by Belgium. April 2, 1881, Mr. Schuyler telegraphed: "England, Italy, and four others recognize kingdom," the four others being Monaco, Greece, Turkey, and Servia. The form of recognition generally adopted was to congratulate the King and Government on the proclamation of the kingdom and to promise a formal reply on receipt of the formal announcement. On April 3, Mr. Schuyler received this telegraphic reply: "If great powers of Europe unite in recognizing new government you will join with them and express congratulations of the President. Await their action." After recognition had been given by France, then by Holland, and then by Russia, Austria, and Germany, besides the powers previously mentioned, Mr. Schuyler, on the 6th of April, presented to the Government the congratulations of the President, and on the next day was received in audience by the King.<sup>c</sup> Mr. Schuyler was subsequently instructed to convey the cordial congratulations of the President to the King on his coronation.<sup>d</sup>

The independence of the principality of Servia was recognized in the Treaty of Berlin (Arts. XXXIV., XXXV.) on conditions similar, so far as they went, to those in the case of Roumania. August 22, 1878, Servia proclaimed its independence. May 23, 1881, Mr. Schuyler, then *chargé d'affaires* of the United States at Bucarest, was instructed to negotiate a treaty with Servia, and, in

<sup>a</sup> Colonel Voinesco, Roumanian envoy, to Mr. Evarts, Sec. of State, Nov. 21, 1880, MSS. Dept. of State.

<sup>b</sup> 21 Stat. 340.

<sup>c</sup> For. Rel. 1881, 984.

<sup>d</sup> Id. 988.

regard to the recognition of its independence, to follow the directions given him in the case of Roumania.<sup>a</sup> A letter was given to him, addressed to the Servian minister of foreign affairs, and accrediting him as the bearer of full powers from the United States to negotiate the treaties therein described.<sup>b</sup> Acting under this special authority from the President, Mr. Schuyler concluded at Belgrade, October 2/14, 1881, the treaty with Servia concerning the rights and privileges of consuls.<sup>c</sup>

## 14. STATES IN AFRICA AND THE EAST

## § 42.

In 1822 the American Colonization Society founded a settlement on the west coast of Africa for freedmen and recaptured slaves. In 1847 this settlement, called Liberia, was constituted a republic, which was recognized in the following year by certain European powers. President Lincoln, in his first annual message, December 3, 1861, declared that if any good reason existed "why we should persevere longer in withholding our recognition of the independence and sovereignty of Hayti and Liberia," he was unable to discern it; but, being "unwilling" to "inaugurate a novel policy in regard to them without the approbation of Congress," he submitted for consideration "the expediency of an appropriation for maintaining a chargé d'affaires near each of those new states." By an act approved June 5, 1862, the President was "authorized, by and with the advice and consent of the Senate, to appoint diplomatic representatives of the United States to the Republics of Hayti and Liberia, respectively," each of such representatives to be "accredited as commissioner and consul-general," and to receive a stated sum as compensation.<sup>d</sup>

No immediate appointment was made under this act to Liberia; but on Sept. 23, 1862, Mr. Adams, then United States minister to England, was empowered to conclude the treaty of commerce and navigation which he signed with the President of Liberia, at London, on the 25th of the ensuing October.

June 24, 1871, a full power and letter of credence were given to Mr. Edgcomb, United States consul at Cape Town, as a special agent to negotiate a treaty with the Orange Free State.<sup>e</sup> He concluded a treaty at Bloemfontein, December 22, 1871.

<sup>a</sup> Mr. Blaine, Sec. of State, to Mr. Schuyler, May 23, 1881, MS. Inst. Roumania, I. 46. See For. Rel. 1881, 36. Mr. Schuyler's full power to negotiate and sign a treaty with Servia was sent to him on May 28, 1881. (MS. Inst. Roumania, I. 49.)

<sup>b</sup> Mr. Blaine, Sec. of State, to Mr. Schuyler, July 15, 1881, MS. Inst. Roumania, I. 53.

<sup>c</sup> March 6, 1882, the Prince of Servia, on the invitation of the Skuptchina, assumed the title of King. (Hertslet, Map of Europe by Treaty, IV. 2785.)

<sup>d</sup> 12 Stat. 421. Mr. Henry Winter Davis, in House Report 129, 38 Cong. 1 Sess., on the joint resolution on Mexican affairs, expressed the view that Hayti and Liberia were recognized by this act.

<sup>e</sup> Sen. Doc. 40, 54 Cong. 2 Sess. 8.

"In 1879 a body was formed calling itself the International Association of the Congo, which was presided over by the Congo. King of the Belgians acting as a private individual, and of which the members and officials were subjects of civilized states. It founded establishments; it occupied territory; it obtained cessions of sovereignty and suzerainty from native chiefs. Yet it was neither legally dependent upon any state, nor did its members reject the authority of their respective governments, and establish themselves permanently on the soil as a *de facto* independent community."<sup>a</sup> In 1884 this association represented to the United States that it had "by treaties with the legitimate sovereigns" in the basins of the Congo and adjacent regions obtained the cession of territory "for the use and benefit of Free States established and being established under the care and supervision of the said association in said basins and adjacent territories, to which cession the said Free States of right succeed;" that it had adopted for itself and the Free States in question a flag; that it and the Free States had resolved to levy no customs duties on goods imported by the route constructed around the Congo cataracts; that they guaranteed to foreigners settling in their territories "the right to purchase, sell, or lease lands and buildings situated therein, to establish commercial houses, and to there carry on trade, upon the sole condition that they shall obey the laws;" and that they would extend equal treatment to the citizens of all nations, and do all in their power to prevent the slave trade.<sup>b</sup>

These representations bear date April 22, 1884. On the same day Mr. Frelinghuysen, Secretary of State, duly empowered by the President, and with the advice and consent of the Senate previously given, declared "that, in harmony with the traditional policy of the United States, which enjoins a proper regard for the commercial interests of their citizens, while at the same time avoiding interference with controversies between other powers, as well as alliances with foreign nations, the Government of the United States announces its sympathy with and approval of the humane and benevolent purposes of the International Association of the Congo, administering, as it does, the interests of the Free States there established, and will order the officers of the United States, both on land and sea, to recognize the flag of the International African Association as the flag of a friendly government." By the act of July 7, 1884, Congress made an appropriation for "an agent to the States of the Congo, \* \* \* said agent to be charged with introducing and extending the commerce of the United States in

<sup>a</sup>Hall, Int. Law, 4th ed. 94. See, as to the origin of the association, S. Ex. Doc. 196, 49 Cong. 1 Sess. 351.

<sup>b</sup>See Mr. Kasson to Mr. Bayard, March 16, 1885, S. Ex. Doc. 196, 49 Cong. 1 Sess. 186.

the Congo Valley.”<sup>a</sup> Germany, by a convention concluded November 8, 1884, recognized the association as a “friendly State,” while Great Britain, in December, by an exchange of declarations, after the manner of the United States, recognized its flag as that of a friendly government. “Within the next two months Italy, the Netherlands, Spain, France, Russia, and Portugal had recognized the association as a government; Austria, Sweden and Norway, and Denmark had acknowledged it to be a State, and Belgium placed ‘its flag on an equality with that of a friendly State.’”<sup>b</sup> February 26, 1885, the association was permitted by the Berlin conference to adhere, by a formal declaration, as an independent state, to the general act concluded on that day.<sup>c</sup> When King Leopold II., acting under the authority afterwards given him by the Belgian Chambers, announced the formation of the Independent State of the Congo and his assumption of the place of sovereign of the new state, the President of the United States formally recognized him in that character.<sup>d</sup>

“The Independent State of the Congo has been organized as a government, under the sovereignty of His Majesty the King of the Belgians, who assumes its chief magistracy in his personal character only, without making the new State a dependency of Belgium. \* \* \* The action taken by this Government last year in being the first to recognize the flag of the International Association of the Congo has been followed by formal recognition of the new nationality which succeeds to its sovereign powers.

“A conference of delegates of the principal commercial nations was

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<sup>a</sup> “When you were designated as agent to the States of the Congo Association it was not intended, either by this Department or by Congress, to actually accredit you to the government of the States of the Congo Association, as it was well known here that those States, as a political entity, did not exist. You were charged with introducing and extending the commerce of the United States in the Congo Valley, and in order to definitely fix the scope of your mission, you were designated as agent to the States of the Congo Association, because it was believed here that the residents of the region adjoining and including the Congo Valley seemed on the verge of establishing constitutional States by progressive movement in that direction.” (Mr. Frelinghuysen, Sec. of State, to Mr. Tisdell, Dec. 12, 1884, S. Ex. Doc. 196, 49 Cong. 1 sess. 357; see also Annual Message, Dec. 1, 1884.)

<sup>b</sup> Hall, Int. Law, 4th ed. 94.

<sup>c</sup> S. Ex. Doc. 196, 49 Cong. 1 sess. 184, 295-296.

<sup>d</sup> King Leopold to the President, Aug. 1, 1885; the President to King Leopold, Sept. 11, 1885, S. Ex. Doc. 196, 49 Cong. 1 sess. 326, 331.

By a convention between Belgium and the Independent State of the Congo, concluded July 3, 1890, it was provided that Belgium would advance to the Independent State the sum of 25,000,000 francs, and that six months after the expiration of the term of ten years Belgium would, if it seemed good to do so, annex the Independent State of the Congo, with all the property, rights, and advantages attached to the sovereignty of that State, and fulfill its obligations toward third parties. (Rivier, *Principes du Droit des Gens*, I. 67.)



held at Berlin last winter to discuss methods whereby the Congo Basin might be kept open to the world's trade. Delegates attended on behalf of the United States on the understanding that their part should be merely deliberative, without imparting to the results any binding character so far as the United States were concerned. \* \* \* Notwithstanding the reservation under which the delegates of the United States attended, their signatures were attached to the general act in the same manner as those of the plenipotentiaries of other Governments, thus making the United States appear, without reserve or qualification, as signatories to a joint international engagement imposing on the signers the conservation of the territorial integrity of distant regions where we have no established interests or control.

"This Government does not, however, regard its reservation of liberty of action in the premises as at all impaired; and holding that an engagement to share in the obligation of enforcing neutrality in the remote valley of the Congo would be an alliance whose responsibilities we are not in a position to assume, I abstain from asking the sanction of the Senate to that general act."

Annual message, Dec. 8, 1885.

See, generally, as to the Berlin conference, the volume entitled "Affairs of the Independent State of the Congo," S. Ex. Doc. 196, 49 Cong. 1 sess.

January 27, 1868, Mr. George F. Seward, consul-general at Shanghai, was empowered to negotiate a commercial and claims convention with the King of Chosen, or Corea.<sup>a</sup> No treaty was made with the country, however, till March 22, 1882, when Commodore Shufeldt signed on the part of the United States the treaty of amity and commerce of that date.<sup>b</sup>

Corea.

### III. RECOGNITION OF NEW GOVERNMENTS.

#### 1. FRANCE.

#### § 43.

August 16, 1792, Gouverneur Morris, then American minister at Paris, wrote to his Government that another revolution had been effected in that capital, and that "it was bloody." He referred in this statement to the deposition of the King on the 10th of the month and the events that attended it. He asked

Revolution of 1792.

<sup>a</sup> Sen. Doc. 40, 54 Cong. 2 sess. 8.

<sup>b</sup> "Your action in refusing to recognize that Korean independence dates from the 6th of June, 1895, is approved. The position assumed by this Government toward Corea since contracting a treaty with it in 1882 has in no wise been affected by recent events. Corea's treaty independence since then has been for us an established fact." (Mr. Adee, Acting Sec. of State, to Mr. Sill, minister to Corea, July 9, 1895, For. Rel. 1895, II, 971.)

for instructions as to the conduct he should pursue "in the circumstances about to arise." The present executive was, he said, just born, and might be stifled in the cradle; and he found himself "in a state of contingent responsibility of the most delicate kind."<sup>a</sup>

Mr. Jefferson, as Secretary of State, November 7, 1792, replied:

"It accords with our principles to acknowledge any Government to be rightful which is formed by the will of the nation, substantially declared. The late Government was of this kind, and was accordingly acknowledged by all the branches of ours; so any alteration of it which shall be made by the will of the nation, substantially declared, will doubtless be acknowledged in like manner. With such a Government *every kind* of business may be done. But there are some matters which I conceive might be transacted with a Government *de facto*, such, for instance, as the reforming the unfriendly restrictions on our commerce and navigation, such as you will readily distinguish as they occur."<sup>b</sup>

Writing to Morris again, March 12, 1793, in an instruction which has often been cited as a fundamental authority, Mr. Jefferson to Morris, March 12, 1793, Jefferson said:

"I am sensible that your situation must have been difficult during the transition from the late form of government to the reestablishment of some other legitimate authority, and that you may have been at a loss to determine with whom business might be done. Nevertheless when principles are well understood their application is less embarrassing. We surely can not deny to any nation that right whereon our own Government is founded—that every one may govern itself according to whatever form it pleases, and change these forms at its own will; and that it may transact its business with foreign nations through whatever organ it thinks proper, whether king, convention, assembly, committee, president, or anything else it may choose. The will of the nation is the only thing essential to be regarded. On the dissolution of the late constitution in France, by removing so integral a part of it as the King, the National Assembly, to whom a part only of the public authority had been delegated, appear to have considered themselves as incompetent to transact the affairs of the nation legitimately. They invited their fellow citizens therefore to appoint a national convention. In conformity with this their idea of the defective state of the national authority, you were desired from hence to suspend further payments of our debt to France till new orders, with an assurance however to the acting power that the suspension should not be continued a moment longer than should be necessary for us to see the reestablishment of some person or body of persons authorized

<sup>a</sup> Am. St. Pap. For. Rel., I. 333, 334.

<sup>b</sup> Jefferson's Works, ed. by Washington, III. 489.

to receive payment and give us a good acquittal (if you should find it necessary to give any assurance or explanation at all). In the mean time we went on paying up the four millions of livres which had been destined by the last constituted authorities to the relief of St. Domingo. Before this was completed we received information that a national assembly had met, with full powers to transact the affairs of the nation, and soon after the minister of France here presented an application for three millions of livres to be laid out in provisions to be sent to France. Urged by the strongest attachments to that country, and thinking it even providential that monies lent to us in distress could be repaid under like circumstances, we had no hesitation to comply with the application, and arrangements are accordingly taken for furnishing this sum at epochs accommodated to the demand and our means of paying it."<sup>a</sup>

February 17, 1793, M. Ternant, the French minister at Philadelphia, notified the United States, in the name of the Provisional Executive Council, that the French nation had constituted itself into a Republic. This notification was acknowledged by Mr. Jefferson, in the name of the President, on the 23d of the same month. He stated that the President had received "with great satisfaction this attention of the Executive Council," in making known the resolution entered into by the National Convention, even before "a definitive regulation of their new establishment could take place;" that the Government and citizens of the United States viewed with the most sincere pleasure every advance of the French nation "towards its happiness, an object essentially connected with its liberty;" that the "genuine and general effusions of joy" that had overspread the United States on seeing the liberties of France "rise superior to foreign invasion and domestic trouble" had proved that the "sympathies" of the American people were "great and sincere," and that it was hoped that these mutual dispositions might be improved by placing the commercial intercourse between the two countries on principles "as friendly to natural right and freedom" as were those of their Governments.<sup>b</sup>

April 18, 1793, Washington submitted to the various members of his Cabinet a series of questions touching the relations between the United States and France. Among these were the questions whether a minister from the Republic of France should be received; and, if so, whether he should be received absolutely or with qualifications. It was unanimously agreed that he should be received; but Hamilton, supported by Knox, the Secretary

<sup>a</sup> Writings of Thomas Jefferson, by Ford, VI. 199. For Washington's comments on this letter, see Ford's Writings of Washington, XII. 269. Mr. Jefferson's letter is engrossed in Instructions to U. States Ministers, I. 235.

<sup>b</sup> MS. Dom. Let. V. 64.

of War, thought that his reception should be qualified by a previous declaration to the effect that the United States reserved the question whether the treaties, by which the relations between the two countries were formed, were not to be deemed temporarily and provisionally suspended. Jefferson, however, supported by Randolph, the Attorney-General, maintained that he should be received without reservation; and when, in the following May, M. Genet, the minister of the French Republic, arrived in Philadelphia, the President immediately gave him an unqualified reception.<sup>a</sup>

**The Empire and the Monarchy.** "The recognition of Napoleon as Emperor of the French was effected by new credentials to Mr. Armstrong, the American minister at Paris. In order that the action of the United States might be prompt and proper a blank form of credence signed by the President was sent to Mr. Armstrong, to fill out in the form and style required by the new Government, and to present when satisfied that the Empire was in possession and control of the governmental power and the territory of the nation—the usual conditions precedent in all cases of recognition by the United States Government. (See MSS., Instructions to France, U. S. Dept. of State, vol. 6, p. 253, Aug. 21, 1804.)

"A similar course was followed upon the abdication of Napoleon and the restoration of the Monarchy (Louis XVIII.), 1814. A blank form of credence was sent to Mr. Crawford, to be properly filled out at Paris and presented as required. (See *Ibid.*, vol. 7, p. 371, June 27, 1814.)"

Report of Mr. Allen, Chief of Bureau of Rolls and Library, Jan. 1, 1897, S. Ex. Doc. 40, 54 Cong. 2 sess.

"The royal family left Paris on the 19th instant, at midnight, and took the road for Lille. Yesterday morning I received a note from Count Jarcourt stating the departure of the King, and informing me that he would see with pleasure the diplomatic corps, without, however, constraining those who prefer to return to their respective courts. \* \* \* The Emperor has not yet appointed his minister of foreign relations. I think it is probable Caulaincourt will be appointed. I shall endeavor to see the minister shortly after his appointment for business purposes which are specified." (Mr. Crawford, minister at Paris, to Mr. Monroe, Sec. of State (unofficial), Mar. 21, 1815, Monroe Pap., Dept. of State.)

**Revolution of 1830—Louis Philippe.** July 26, 1830, in the midst of public expectation of the meeting of the legislative chambers, which had been summoned to meet on the 3rd of August, the King of France, after holding a royal council, promulgated certain ordinances which announced the dissolution of the new Chamber of Deputies, made radical changes in the system of elections,

<sup>a</sup> Writings of Washington, Sparks' ed., X. 553; Jefferson's Works, Washington's ed., IX. 140; Hamilton's Works, Lodge's ed., IV. 74-79; Jefferson's Works, Ford's ed., VI. 219, 220; Jefferson's Works, Washington's ed., III. 563.

suspended the liberty of the press, and suppressed all the journals of the opposition. On the following day large assemblages of the people took place in the streets, and several collisions occurred with the military, who attempted to disperse them. On the 28th of July Paris was declared by the King to be in a state of siege, but the popular forces increased and the contest assumed a more serious and sanguinary character. On Thursday, the 29th, the people took the Louvre and the Tuileries, to which the military had retired, and the remnant of the troops, many of whom had joined the people, retired beyond the city walls. A civil government was immediately organized, with the general assent of the people, by the deputies who happened to be in the city. Thus came about what Mr. Rives, then minister of the United States at Paris, describes as "one of the most wonderful revolutions which have ever occurred in the history of the world." "At this moment," said Mr. Rives, "the tricolored flag waves over the palace of the Tuileries, and the city of Paris, after passing through three days of commotion and bloodshed, is now as tranquil, under its provisional government, as I have ever seen it under the royal authority. The King, who, with all his ministers, remained at St. Cloud's during the troubles here, has, it is said, abandoned St. Cloud and taken the route to the Netherlands."<sup>a</sup> Referring to Louis Philippe, who had been installed as King, and whose Government was duly recognized, President Jackson, in his annual message of December 6, 1830, declared that the American people, while assured of "the high character of the present King of the French," a character which, if sustained to the end, would "secure to him the proud appellation of the Patriot King," yet rejoiced "not in his success, but in that of the great principle which has borne him to the throne—the paramount authority of the public will."<sup>b</sup>

February 24, 1848, Mr. Rush, United States minister at Paris, wrote that the attempt of the Government to enforce with troops an interdict forbidding a "reform banquet," which was to have been held by the opposition members of the Chamber of Deputies and others, had produced a state of things "little short of revolutionary." Even as he wrote cavalry were hastily passing through the streets within his hearing, and rumors were flying that the King had abdicated and that the Count of Paris was proclaimed.<sup>c</sup> Scarcely had he folded his dispatch, when the revolution was accomplished and the monarchy overthrown. The King abdicated and fled with the royal family, and all attempts to establish a regency, with the Count of Paris as successor to the throne,

**The Republic,  
1848.**

<sup>a</sup> Mr. Rives, minister to France, to Mr. Van Buren, Sec. of State, July 30, 1830, H. Ex. Doc. 147, 22 Cong. 2 sess. 138.

<sup>b</sup> Richardson, Messages and Papers of the Presidents, II. 501.

<sup>c</sup> S. Ex. Doc. 53, 30 Cong. 1 sess. 2.

failed. A provisional government was immediately formed. It was proclaimed on the morning of Friday, the 25th, the proclamation declaring that the provisional government desired a republic, subject to the ratification of the French people. On Saturday, the 26th, Mr. Rush received an intimation that his "personal presence at the Hotel de Ville, to cheer and felicitate the provisional Government, would be acceptable." Before the day was out he imparted his determination to take the step. Monday, the 28th, was appointed for it, and on that day he repaired to the Hotel de Ville, accompanied by his secretary of legation, and delivered to the President and other members of the provisional Government there assembled an address of congratulation. On the same day he acknowledged a note written by M. Lamartine, as minister of foreign affairs of "the provisional government of the French Republic," and stated that, pending the receipt of instructions, he would be ready to transact with him whatever business might appertain to the United States or to its citizens in France.<sup>a</sup>

Mr. Buchanan, in transmitting to Mr. Rush a letter of credence to the French Republic, said:

"It was right and proper that the envoy extraordinary and minister plenipotentiary from the United States should be the first to recognize, so far as his powers extended, the provisional Government of the French Republic. Indeed, had the representative of any other nation preceded you in this good work, it would have been regretted by the President. \* \* \* In its intercourse with foreign nations the Government of the United States has, from its origin, always recognized *de facto* governments. We recognize the right of all nations to create and re-form their political institutions according to their own will and pleasure. We do not go behind the existing Government to involve ourselves in the question of legitimacy. It is sufficient for us to know that a government exists capable of maintaining itself; and then its recognition on our part inevitably follows. This principle of action, resulting from our sacred regard for the independence of nations, has occasioned some strange anomalies in our history. The Pope, the Emperor of Russia, and President Jackson were the only authorities on earth which ever recognized Dom Miguel as King of Portugal.

"Whilst this is our settled policy, it does not follow that we can ever be indifferent spectators to the progress of liberty throughout the world, and especially in France. We can never forget the obligations which we owe to that generous nation for their aid at the darkest period of our Revolutionary war in achieving our own independence. \* \* \* It was, therefore, with one universal burst of enthusiasm that the American people hailed the late glorious revolution in France in favor of liberty and republican government. In this feeling the President

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<sup>a</sup>8. Ex. Doc. 32, 30 Cong. 1 sess. 2-3.

strongly sympathizes. Warm aspirations for the success of the new Republic are breathed from every heart."<sup>a</sup>

President Polk, in a special message to Congress, spoke in similar terms, saying that Mr. Rush, called upon to act in a sudden emergency, which could not have been anticipated by his instructions, "judged rightly of the feelings and sentiments of his Government and of his countrymen, when, in advance of the diplomatic representatives of other countries, he was the first to recognize, so far as it was in his power, the free Government established by the French people.

"The policy of the United States has ever been that of nonintervention in the domestic affairs of other countries, leaving to each to establish the form of government of its own choice. While this wise policy will be maintained toward France, now suddenly transformed from a monarchy into a republic, all our sympathies are naturally enlisted on the side of a great people, who imitating our example, have resolved to be free."<sup>b</sup>

Congress, by a joint resolution, tendered its congratulations, in the name of the American people, "to the people of France, upon the success of their recent efforts to consolidate the principles of liberty in a republican form of government," and requested the President to transmit the resolution to the American minister at Paris, with instructions to present it to the French Government.<sup>c</sup>

December 2, 1851, Louis Napoleon, as President of the French Republic, issued a decree dissolving the National Assembly  
 Revolution of 1851;  
 Second Empire. and Council of State, declaring universal suffrage to be established, convoking the people in their primary assemblies, and proclaiming a state of siege. Mr. Rives, the minister of the United States at Paris, continued his communications, though informally, with the department of foreign affairs, but abstained for the moment from appearing at the weekly receptions of the President, pursuing in this regard a different course from that observed by the rest of the diplomatic corps, with the exception of the Swiss minister, who soon received instructions, however, to resume his attendance. "I felt it did not become me," said Mr. Rives, "representing as I did a free constitutional republic and a people imbued with a sacred hereditary attachment to the fundamental guaranties of civil and political liberty, to seem, by my presence, on an occasion succeeding so soon the successful *coup d'état* of the President, to give either a

<sup>a</sup> Mr. Buchanan, Sec. of State, to Mr. Rush, March 31, 1848, S. Ex. Doc. 53, 30 Cong. 1 sess. 3.

<sup>b</sup> April 3, 1848, S. Ex. Doc. 32, 30 Cong. 1 sess. 1-2; Richardson's Messages, IV. 576.

<sup>c</sup> 9 Stat. 334. See, also, Mr. Buchanan to Mr. Rush, April 6, 1848, announcing the adoption of the resolution unanimously by the Senate on that day, under a suspension of rules. (MS. Inst. France, XV. 69.)

personal or official sanction to measures by which all those guaranties had been trodden under foot." <sup>a</sup>

The elections held throughout France on the 20th and 21st of December, 1851, having resulted in the exhibition of the "unprecedented majority" of 7,439,216 to 640,737 in favor of prolonging and enlarging the President's powers, Mr. Rives attended his reception on the New Year. <sup>b</sup>

"Your dispatches have been regularly received up to the 24th of last month. \* \* \* Before this reaches you the election will be over; and if, as is probable, a decided majority of the people should be found to support the President, the course of duty for you will become plain. From President Washington's time down to the present day it has been a principle, always acknowledged by the United States, that every nation possesses a right to govern itself according to its own will, to change institutions at discretion, and to transact its business through whatever agents it may think proper to employ. This cardinal point in our policy has been strongly illustrated by recognizing the many forms of political power which have been successively adopted by France in the series of revolutions with which that country has been visited. Throughout all these changes the Government of the United States has conducted itself in strict conformity to the original principles adopted by Washington, and made known to our diplomatic agents abroad, and to the nations of the world, by Mr. Jefferson's letter to Gouverneur Morris, of the 12th March, 1793; and if the French people have now substantially made another change, we have no choice but to acknowledge that also; and as the diplomatic representative of your country in France, you will act as your predecessors have acted, and conform to what appears to be settled national authority. And while we deeply regret the overthrow of popular institutions, yet our ancient ally has still our good wishes for her prosperity and happiness, and we are bound to leave to her the choice of means for the promotion of those ends."

Mr. Webster, Sec. of State, to Mr. Rives, Jan. 12, 1852, S. Ex. Doc. 19, 32 Cong. 1 sess. 19.

See, also, message of March 21, 1853, S. Ex. Doc. 7, 32 Cong. special session.

On the establishment of the Second Empire, under Louis Napoleon as Napoleon III., Mr. Rives was furnished with a new credence in the usual way, and was instructed to recognize the imperial authority, the assurance being repeated that the United States gladly recognized the right of every nation to determine the form of its government. <sup>c</sup>

<sup>a</sup> Mr. Rives to Mr. Webster, Sec. of State, Dec. 10, 1851, S. Ex. Doc. 19, 32 Cong. 1 sess. 8, 13.

<sup>b</sup> S. Ex. Doc. 19, 32 Cong. 1 sess. 18.

<sup>c</sup> MS. Inst. France, XV. 165, 169, Dec. 17 and Dec. 18, 1852; S. Doc. 40, 54 Cong. 2 sess. 3.



Napoleon III. having been deposed and a Republic having been proclaimed under the provisional government of the National Defense Committee, Mr. Washburne, the minister of the United States at Paris, September 6, 1870, was instructed: "If provisional government has actual control and possession of power, and is acknowledged by French people, so as to be, in point of fact, *de facto* government, of which you will be able to decide by the time this reaches you, you will not hesitate to recognize it."<sup>a</sup> On the same day another telegram was sent: "It appearing by your last dispatch that new government is fully installed and Paris remains tranquil, you will recognize." And later, another: "As soon as situation in your judgment shall justify, tender the congratulations of President and people of United States on the successful establishment of Republican government."<sup>b</sup> September 7, Mr. Washburne recognized the new government, being the first diplomatic representative to do so.

"As soon as I learned that a République had been proclaimed at Paris, and that the people of France had acquiesced in the change, the minister of the United States was directed by telegraph to recognize it, and to tender my congratulations and those of the people of the United States. The reestablishment in France of a system of government disconnected with the dynastic traditions of Europe appeared to be a proper subject for the felicitations of Americans. Should the present struggle result in attaching the hearts of the French to our simpler forms of representative government, it will be a subject of still further satisfaction to our people. While we make no effort to impose our institutions upon the inhabitants of other countries, and while we adhere to our traditional neutrality in civil contests elsewhere, we can not be indifferent to the spread of American political ideas in a great and highly civilized country like France."

President Grant, Second Annual Message, Dec. 5, 1870.

"The regular Government of France, constituted by the will of the people as expressed through the National Assembly at Bordeaux, having been driven from Paris by the insurrectionary movement and established itself at Versailles, I deem it my duty to follow that Government, and shall, therefore, on to-morrow or the next day, remove thither with the legation, leaving one of the secretaries in charge here. Every member of the diplomatic corps will also leave."

Mr. Washburne to Mr. Fish, Mar. 19, 1871, MS. Dispatches, France.

See Franco-German War and Insurrection of the Commune, containing the correspondence of Mr. Washburne, which was communicated to Congress with the President's message of Feb. 6, 1878.

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<sup>a</sup> Mr. Davis, Acting Sec., to Mr. Washburne, telegram, Sept. 6, 1870, For. Rel. 1870, 67.

<sup>b</sup> For. Rel. 1870, 67.

Mr. Washburne was instructed by telegraph, March 11, 1871: "You will recognize the government of M. Thiers." (Mr. Fish, Sec. of State, to Mr. Washburne, MS. Inst. France, XVIII. 489.)

## 2. THE NETHERLANDS.

### § 44.

In November, 1794, Mr. John Quincy Adams, then minister to the Netherlands, sought instructions as to the course he should pursue in case of the conquest of the country by France. Mr. Randolph, Secretary of State, replied:

"The maxim of the President toward France has been to follow the government of the people. Whatsoever regimen a majority of *them* shall establish, is both *de facto* and *de jure* that to which our minister there addresses himself. If therefore the *independency* of the United Netherlands continues, it is wished that you make no difficulty in passing from the old to any new constitution of the people. If the new rulers will accept your old powers, and credentials, offer them. If they require others, adapted to the new order of things, assure the proper bodies or individuals that you will write for them, and doubt not that they will be expedited."

Should the United Netherlands, added Mr. Randolph, become a dependency of France, Mr. Adams' mission would of course be ended by the extinction of the nation itself; but in such case he was to continue on the ground, report, and await instructions, and avoid giving offence to either side; and, should it be doubtful in whose hands victory would ultimately rest, prudence would prevent his committing the government till he could see his way clear. He would be best able to judge whether, under this or any other circumstance, he could not contrive an adequate pretext for retiring to some spot, within the seven provinces or their dependencies, until he should receive an answer from his government. But such a retirement ought to be so managed as to have nothing of the air of design, or of alienation from the existing rulers. It would be a delicate step, and would require to be thoroughly matured. "The only end proposed by this suggestion is that you may shelter yourself from inconvenient importunities."

Instruction of Feb. 27, 1795, MS. Inst. to U. S. Ministers, II. 323, 324.

"A war between the United Provinces and France broke out in 1793. In 1795 the Stadtholder was driven from the country and the Batavian Republic was established. This was succeeded by the Kingdom of Holland, after which the country was incorporated into the French Empire, and remained a part of that Empire until the abdication of Napoleon. On the reconstruction of Europe at the Congress of Vienna, a new Kingdom was formed, called the Kingdom of the Netherlands, in which was included the territories which had formed the United Provinces of the Netherlands. The new Power opened Diplomatic Relations with the United States by sending a Minister to Washington." (Davis, Notes, Treaty volume, 1776-1887, p. 1235.)

Mr. Edward Livingston, as Secretary of State, in a note to Sir Charles Vaughan, the British minister, April 30, 1833, said:

Death of a Sovereign. "It has been the principle and the invariable practice of the United States to recognize that as the legal Government of another nation which by its establishment in the actual exercise of political power might be supposed to have received the express or implied assent of the people."<sup>a</sup>

Mr. Rives, acting Secretary of State, in an instruction to Mr. Roosevelt, United States minister to the Netherlands, October 10, 1888, in reply to inquiries suggested by the dangerous state of the health of the King, quotes this passage as setting forth the doctrine of the United States "in relation to the recognition of changes in the dynastic succession or form of government of sovereign states," and adds: "Should the illness of His Majesty \* \* \* unhappily terminate fatally, you will of course recognize any form of succession duly provided for by the procedure of the Netherlands. No 'ultra official' action would be necessary. A change of sovereign will, according to the usual procedure, involve sending you new credentials, to be presented as in the case of your first credence."<sup>b</sup>

### 3. ROME AND THE PAPAL STATES.

#### § 45.

Mr. Pickering, Secretary of State, in an instruction to Mr. Satori, United States consul at Rome, March 28, 1799, in regard to the new Roman Republic, said that the United States, "sincerely respecting the rights of self-government of all other nations," "do not interfere in their internal arrangements. The consuls of the United States, then, wherever they are, will consider it to be their duty to respect the 'powers that be,' and, under every change of government, use their endeavor to protect the persons and property of American citizens."

In a subsequent instruction of June 11, 1799, in reply to a question of the consul whether the United States would "acknowledge the Roman Republic," Mr. Pickering, while reaffirming what he had said on the 28th of March, and directing that "due deference" be paid to the "actual government," added: "In my former letter I expressed a wish 'that the Roman Republic was a self-governed state.' You know that it is not. Formally to acknowledge it then, would only be to acknowledge the supreme power of the *French general commanding in Italy*."<sup>c</sup>

<sup>a</sup> MS. Notes to Foreign Legations, V. 102.

<sup>b</sup> MS. Inst. Netherlands, XVI. 1.

<sup>c</sup> MS. Inst. to U. S. Ministers, V. 88, 152.

President Polk in his annual message of December 7, 1847, said:

**Papal States.** "The Secretary of State has submitted an estimate to defray the expense of opening diplomatic relations with the Papal States. The interesting political events now in progress in these States, as well as a just regard to our commercial interests, have, in my opinion, rendered such a measure highly expedient." By the act of March 27, 1848, Congress made an appropriation for a *chargé d'affaires*.<sup>a</sup> In the instructions to this official there is the following passage:

"There is one consideration which you ought always to keep in view in your intercourse with the Papal authorities. Most, if not all, the Governments which have diplomatic representatives at Rome are connected with the Pope as the head of the Catholic Church. In this respect the Government of the United States occupies an entirely different position. It possesses no power whatever over the question of religion. All denominations of Christians stand on the same footing in this country; and every man enjoys the inestimable right of worshipping his God according to the dictates of his own conscience. Your efforts therefore will be devoted exclusively to the cultivation of the most friendly civil relations with the Papal Government, and to the extension of the commerce between the two countries. You will carefully avoid even the appearance of interfering in ecclesiastical questions, whether these relate to the United States or to any other portion of the world. It might be proper, should you deem it advisable, to make these views known, on some suitable occasion, to the Papal Government, so that there may be no mistake or misunderstanding on this subject."<sup>b</sup>

Shortly after these instructions were given a revolution occurred at Rome and the government of the Pope was displaced. The Government of the United States, however, considering "the speedy restoration of the Pope highly probable, if not absolutely certain," instructed its *chargé d'affaires*, while proceeding immediately to Rome and gathering all the information obtainable, to withhold his letter of credence till he should receive specific directions as to the minister of foreign affairs to whom it should be delivered.<sup>c</sup>

Subsequently, the situation having apparently become "more and more complicated and entangled," it was left to his discretion, in order to avoid any unnecessary delay, to present his letter of credence to

<sup>a</sup> 9 Stat. 216. For the debates on this act, see App. to Cong. Globe, 30 Cong., 1 sess., 1847-8, pp. 403-410, 437, 442.

<sup>b</sup> Mr. Buchanan, Sec. of State, to Mr. Martin, April 5, 1848, MS. Inst. Papal States, I. 3.

<sup>c</sup> Mr. Buchanan, Sec. of State, to Mr. Cass, Feb. 16, 1849, MS. Inst. Papal States, I. 11.

the minister of foreign affairs of the provisional government, or to withhold it some time longer.<sup>a</sup>

When, in 1866, the diplomatic representative of the United States at Rome looked forward to a possible political revolution in the States of the Church, to the head of which he was accredited, he was instructed: "Should the sovereignty at Rome undergo a revolutionary change, you will suspend the exercise of diplomatic functions within the territory in which a new government shall have been established. Should the present government remove and take up a residence in any other place, whether in or out of Italy, you will not be expected to follow it until the case, as it shall then exist, shall have received the attention of the President, and until his views thereupon shall have been made known. In the case of such removal, you will either remain at Rome, or take up your temporary residence in some adjacent country, as in your discretion shall seem expedient."<sup>b</sup>

#### 4. SPAIN.

#### § 46.

After the setting up of the Napoleonic government in Spain, and the deposition of Charles IV., the Central Junta, which was formed in the name of Ferdinand VII. to maintain the independence of the nation, sent to the United States as its diplomatic representative the Chevalier de Onis. On submitting his credentials he was invited by the Secretary of State to a conference, in which he was informed that as the United States had "deliberately determined to remain neutral during the present war in Europe, and to avoid every act whatever which might have a tendency to afford to either of the belligerents even a pretext of complaint, the President could not consistently receive him, while it is not known in whose possession the sovereignty of Spain

<sup>a</sup> Mr. Clayton, Sec. of State, to Mr. Cass, June 25, 1849, MS. Inst. Papal States, I. 14.

Mr. Clayton, as Sec. of State, in an instruction to Mr. Donelson, minister to Prussia, July 8, 1849, MS. Inst. to Prussia, XIV. 165, said:

"We, as a nation, have ever been ready, and willing, to recognize any Government, *de facto*, which appeared capable of maintaining its power; and should either a republican form of government, or that of a limited monarchy (founded on a popular and permanent basis) be adopted by any of the States of Germany, we are bound to be the first, if possible, to hail the birth of the new Government, and to cheer it in every progressive movement that has for its aim the attainment of the priceless and countless blessings of freedom."

<sup>b</sup> Mr. Seward, Sec. of State, to Mr. King, Aug. 16, 1866, MS. Inst. Papal States, I. 97. See, as to stationing an American ship of war at Cavita Vecchia, in accordance with the wish of the cardinal secretary of state, Mr. Seward to Mr. King, Nov. 30 and Dec. 8, 1866, *id.* 101, 104.

actually is." The President would not take it upon himself "to consider the question *de jure*;" he would be content "in merely looking at the question *de facto*;" but, until "this question of possession" was "distinctly settled," he would not "by any act whatever evince a disposition prematurely to recognize in either claimant the sovereignty of Spain." These views were repeated to the Chevalier de Onis in a subsequent conference, in which he was also informed that as it was "found to be impossible" to give "a formal written answer" to his communications "without recognizing in some degree his public character as well as that of the Supreme Junta, \* \* \* such an answer could not be given." Mr. Erving, who had been representing the United States as chargé d'affaires at Madrid, was at the same time instructed that his communications with the Supreme Junta must be "informal." He was to be careful not to commit his Government; and the question of remaining or withdrawing was left to his sound discretion, to be exercised according to what should take place after the receipt of the Chevalier de Onis's dispatches by the Supreme Junta.<sup>a</sup>

"There appears on the files and records of this Department no evidence that Joseph Bonaparte was ever recognized by this Government as King of Spain *de jure* or *de facto*. Extracts are herewith inclosed of two letters from the Secretary of State, one to G. W. Erving, in 1809, and the other to Don Pedro Cevallos, in 1815, which will show the course adopted by this Government during the late war in Spain."

Mr. Adams, Sec. of State, to Mr. White, Jan. 16, 1822, 19 MS. Dom. Let. 236.

"During the period while this Government declined to receive Mr. Onis as the minister of Spain, no consul received an exequatur under a commission from the same authority. The Spanish consuls who had been received before the contest for the government of Spain had arisen, were suffered to continue the exercise of their functions for which no new recognition was necessary."

Mr. Adams, Sec. of State, to the President, Jan. 28, 1819, Am. State Pap. For. Rel. IV. 413.

In an unsigned paper delivered to Mr. Chacon, vice-consul of Spain at Alexandria, March 19, 1814, Mr. Monroe stated that the United States would acknowledge the government of Spain, whenever, the contest for it having terminated, it was established in some permanent and independent form; and that the United States would do this "without consulting or communicating with any other power." This last observation was made with reference to an intimation that the British commissioners, in the negotiations then expected to be held at Gottenburg, "would insist on the acknowledgment of the government of Spain by the United States as a preliminary condition to the formation of any treaty." (MS. Notes to For. Leg. II. 149.)

<sup>a</sup> Mr. Smith, Sec. of State, to Mr. Erving, Nov. 1, 1809, MS. Inst. to U. S. Ministers, VII. 61.

June 9, 1813, Mr. Monroe, as Secretary of State, gave instructions to Mr. Anthony Morris, as a confidential agent to the regency at Madrid. The instructions referred to the efforts made to settle questions with Spain as to claims and boundaries; to the recent taking possession of West Florida, which "belonged" to us; and to the danger of British encroachments in East Florida. The "special object" of his mission was to impress on the regency the friendly policy of the United States. The United States considered the question of West Florida as "settled," but would like to acquire East Florida either as an indemnity for claims, or in trust subject to future negotiation. The unfriendly course of the Chevalier de Onis was also mentioned. October 11, 1814, Mr. Monroe wrote to Mr. Morris, saying that his conduct had been entirely satisfactory, and requesting him, as Mr. Erving had been appointed minister to Spain, to turn over his papers to him and communicate to him any information that he had obtained. (*The Nation*, April 14, 1898, vol. 66, pp. 281-283.)

When the Napoleonic wars came to an end, and, the contest in Spain having ceased, "**Ferdinand VII.** Ferdinand was recognized and received by the nation," the President, seeing "with satisfaction that the period had arrived, when the ancient relations with Spain might be renewed, without compromising the neutrality of the United States," appointed Mr. Erving as minister to that sovereign and directed him forthwith to repair to Madrid in that character. The Chevalier de Onis, who had continued to reside in the United States, was afterwards received as minister from Spain, a question as to his personal acceptability, which was ultimately waived, having delayed his reception.

Mr. Monroe, Sec. of State, to Don Pedro Cevallos, Spanish minister of State, July 17, 1815, MS. notes to For. Leg. II. 106.

The Duke of Aosta having been elected by the Cortes, November 16, 1870, as King of Spain, Mr. **Duke of Aosta, 1870.**

Fish wrote:

"We have always accepted the general acquiescence of the people in a political change of government as a conclusive evidence of the will of the nation. When, however, there has not been such acquiescence, and armed resistance has been shown to changes made or attempted to be made under the form of law, the United States have applied to other nations the rule that the organization which has possession of the national archives and of the traditions of Government, and which has been inducted to power under the forms of law, must be presumed to be the exponent of the desires of the people until a rival political organization shall have established the contrary. Your course in the present case will be governed by this rule.

"Should there be circumstances which lead you to doubt the propriety of recognizing the Duke of Aosta as King of Spain, it will be easy to communicate with the Department by telegraph and ask instructions. Should there be no such circumstances, the general policy of the United States, as well as their interests in the present relations

with Spain, call for an early and cheerful recognition of the change which the nation has made."

Mr. Fish, Sec. of State, to Mr. Sickles, Dec. 16, 1870, For. Rel. 1871, p. 742.

February 10, 1873, General Sickles reported that the King had announced to the cabinet his desire to abdicate. Next day the Cortes accepted his abdication, and adopted a republican form of government. February 12, General Sickles was instructed to recognize the republican government so soon as it was "fully established and in possession of the power of the nation." He was officially received by Chief Executive Figueras on the 15th. The Congress of the United States, by a joint resolution, extended its congratulations.<sup>a</sup> January 3, 1874, President Castelar resigned, the Cortes was dispersed by military force, and a provisional government was formed under Marshal Serrano.<sup>b</sup> May 30, 1874, Mr. Cushing, who had succeeded General Sickles as minister to Spain, presented his credentials to this government.<sup>c</sup>

#### 5. PORTUGAL.

#### § 47.

November 2, 1826, Mr. Barrozo, the Portuguese chargé d'affaires, informed the Secretary of State of the United States that on the 27th of the preceding April the constitution, granted by King John VI. in 1826, had been sworn to by the Infant Regent and accepted by the nation. On the 28th of May, 1828, he communicated to the Secretary of State a letter from the Infante Dom Miguel to the President, stating that he had assumed the regency of Portugal in the name of his brother, Dom Pedro IV., as King. On the 18th of July in the same year Mr. Barrozo transmitted to the Secretary of State the text of two decrees of the Regent, Dom Miguel, and declaring that he was unable longer to recognize "a government which, acting in opposition to the constitution, pretends likewise to usurp the sacred and inalienable rights of His Most Faithful Majesty Dom Pedro IV.," announced that he would immediately cease to exercise his functions as diplomatic agent from that Government, and would submit his course to His Most Faithful Majesty in order that he might receive the royal directions. On the 28th of August Mr. Barrozo advised the Secretary of State that a provisional junta had been installed at Oporto on the 20th of May for the purpose of maintaining the legitimate authority of Dom Pedro as King of Portugal under the constitution of 1826. In this note he also stated that when he ceased to exercise his diplomatic functions he did not

<sup>a</sup> For. Rel. 1873, II. 887-930.

<sup>b</sup> For. Rel. 1874, 852.

<sup>c</sup> Mr. Cushing to Mr. Fish, June 1, 1874, For. Rel. 1874, 885. See, particularly, the dispatch of Mr. Cushing, No. 76, Aug. 14, 1874, id. 904, on the recognition by the United States of *de facto* governments in Spain, and the salutary effect of this rule.



consider himself as thereby ceasing to be the chargé d'affaires of His Most Faithful Majesty; that although he had previously recognized the authority of the provisional junta, he desired to be officially informed of its installation in order to resume his functions, and that, having received such information, and finding the proceedings of the junta to accord with the constitution, he believed it to be his duty to resume his diplomatic functions as representative of the legitimate King. This note was received at the Department of State in the absence of the Secretary, and was acknowledged by the chief clerk with the simple statement that it would be laid before Mr. Clay on his return. On the 6th of November, 1828, Mr. Barrozo, as chargé d'affaires of Portugal, addressed a note to the Secretary of State, informing him of the arrival in England of the young Queen of Portugal, Dona Maria de Gloria; and on the 27th of the same month, still styling himself chargé d'affaires, announced the abdication of Dom Pedro in favor of his daughter, Dona Maria de Gloria. These notes remained unanswered, and the only communication made by the Department of State to Mr. Barrozo, as chargé d'affaires of Portugal, after his letter of July 18, 1828, was a circular, of March 3, 1829, written by the chief clerk to members of the diplomatic corps, inviting them to attend the inauguration of the President. No official communication was afterwards made to or received from Mr. Barrozo in his character of chargé d'affaires; but on two occasions, when circulars were sent to the members of the diplomatic corps, his name was omitted. From informal conversations with him the Secretary of State understood it to be his intention to await in the United States the result of events at home and the decision of the Government of the United States on the question of recognition. October 3, 1829, Mr. Barrozo, as consul-general of Portugal, announced the cessation of his consular functions, returned his exequatur, and requested his passports, which were sent to him on the 8th of the month. This step on the part of Mr. Barrozo was due to circumstances the narration of which immediately follows.

August 30, 1828, Mr. Torlade d'Azambuja presented himself at the Department of State and delivered to the chief clerk his original letter of credence, which was returned to him at the same interview; and, with a note of the same day, he communicated to the Department a copy of his credentials in the form of a letter from the Viscount Santarem, minister of foreign affairs of Portugal, to the Secretary of State of the United States, of March 31, 1828, introducing him as the appointee of His Highness the Infant Regent of Portugal and the Algarves as chargé d'affaires of Portugal near the Government of the United States. The change which had then taken place in the Government of Portugal rendered it necessary that Mr. Torlade should present new credentials, and his recognition was therefore delayed. March 18, 1829, Mr. Torlade communicated to the Secretary of State

a copy of a new credential letter, dated December 23, 1828, signed by the Viscount Santarem and introducing him as the *chargé d'affaires* of His Most Faithful Majesty Dom Miguel, and solicited an interview for the purpose of presenting the original.<sup>a</sup> His note remaining unanswered, Mr. Torlade on the 25th of April addressed a note to the Secretary of State, calling attention to it and renewing his request for an interview. This communication likewise remaining unanswered, Mr. Torlade on the 28th of September, 1829, addressed to the Secretary of State another note, setting forth the circumstances attending his residence in Washington and again urging that he be admitted to present his original letter of credence.

About the same time Mr. Rebello, *chargé d'affaires*, from Brazil, interposed a strong remonstrance against Mr. Torlade's reception, on the ground that Dom Miguel was an usurper of the throne of Dona Maria II., Queen of Portugal, and therefore ought not to be recognized by civilized states; that the rights of that Princess were indisputable, as being immediately derived from her father, Dom Pedro I., Emperor of Brazil, the hereditary and legitimate sovereign of Portugal; and that a recognition of Dom Miguel might jeopard the existing friendly relations between the United States and Brazil. Under these circumstances Mr. Van Buren, who had then become Secretary of State, informed Mr. Torlade, in a personal conference at the Department of State, that the President would wait for information from Mr. Brent, *chargé d'affaires* of the United States in Portugal, as to the actual situation in Portugal and its probable duration, before determining whether he should be recognized in his public character; and Mr. Brent was instructed to make with all possible dispatch a full report on the subject.<sup>b</sup> From this report it appeared "that Dom Miguel occupies the throne of Portugal as absolute King; that, throughout the whole realm without any exception, his authority as such is recognized and acknowledged, and that he exercises over it complete, uncontrolled, and exclusive dominion."<sup>c</sup> "The moment then appeared to have arrived," said Mr. Van Buren, "when this Government could no longer forbear from taking a determination upon the subject. Such a course was urged by every consideration of expediency. The two Governments being unrepresented near each other by regularly accredited agents, all diplomatic intercourse was sus-

<sup>a</sup> Mr. Van Buren, Sec. of State, to Mr. Brown, *chargé d'affaires* to Brazil, Oct. 20, 1830, MS. Inst. Am. States, XIV. 101.

<sup>b</sup> Mr. Van Buren, Sec. of State, to Mr. Brent, *chargé d'affaires* in Portugal, April 4, 1829, MS. Inst. to U. S. Ministers, XIII. 2.

<sup>c</sup> Mr. Van Buren, Sec. of State, to Mr. Tudor, *chargé d'affaires* at Rio de Janeiro, Sept. 4, 1829, MS. Inst. to U. S. Ministers, XIV. 28.

pended. The authority of the former Portuguese consuls in our ports was no longer respected in Portugal, and our commerce, left unprotected, became exposed to all the dangers and delays resulting from the want of consular documents, and the absence of the public minister. But, even apart from the foregoing considerations, the course which had ever before been pursued by the United States of always recognizing the government existing *de facto*, and which had but recently led to the acknowledgment of that of Brazil, left them no choice in the instance under consideration, and Mr. Torlade was consequently, on the 2nd of October, 1829, after more than a year's urgent solicitation, admitted to present his credentials, and has ever since resided here as the accredited representative of the government of Dom Miguel, King of Portugal. Mr. Brent, our chargé d'affaires at Lisbon, was soon after directed to resume his functions, and a regular diplomatic intercourse between the two Governments has been the result of these measures."<sup>a</sup>

## 6. GERMAN EMPIRE.

## § 48.

By a letter addressed to the Emperor March 16, 1871, the President of the United States formally recognized the German Empire.<sup>b</sup>

## 7. COLOMBIA.

## § 49.

“Your business is solely with the actual Government of the country where you are to reside, and you should sedulously endeavor, by a frank and courteous deportment, to conciliate its esteem and secure its confidence. So far as we are concerned, that which is the Government *de facto* is equally so *de jure*. Should any change in the Government of Colombia take place, rendering your credentials inapplicable, you will be at no loss for the proper explanation; and should the new Government refuse to receive you without others, in another form, you will, of course, transmit the earliest notice of the circumstance to this Department that what is wanting may be supplied. In the meantime it may be expected that informal communications will enable you to pursue with due effect the objects claiming your attention.”

Mr. Van Buren's  
Instructions.

Mr. Van Buren, Sec. of State, to Mr. Moore, June 9, 1829, MS. Inst. Am. St., XIV. 19.

<sup>a</sup>Mr. Van Buren, Sec. of State, to Mr. Brown, chargé d'affaires to Brazil, Oct. 20, 1830, MS. Inst. to Am. States, XIV. 101. “The Pope, the Emperor of Russia, and President Jackson were the only authorities on earth which ever recognized Dom Miguel as King of Portugal.” (Mr. Buchanan, Sec. of State, to Mr. Rush, March 31, 1848, *supra*, § 43.)

<sup>b</sup>MS. Communications to Foreign Sovereigns and States, 199; S. Doc. 40, 54 Cong. 2 sess. 8.

From the spring of 1861 till June, 1863, when "the civil war \* \* \* having ended," there appeared to be "an universal acquiescence of the people in the provisional government" established by General Mosquera in Colombia, no government in that country was officially recognized by the United States.<sup>a</sup>

In August, 1867, there appearing to be "a general consent of the Colombian people to the change lately effected by the recent movements at Bogota, by which General Mosquera, the President, was deprived of his power and Mr. Santos-Acosta substituted in his place," the President of the United States did "not feel authorized to withhold his recognition of the present *de facto* executive head of the Government of Colombia;" and the minister of the United States at Bogota was instructed to present his credentials "at the earliest convenient opportunity."<sup>b</sup>

July 31, 1900, Señor Marroquin, Vice-President of Colombia, being then at Bogota, assumed, with the concurrence of the commanders of the garrison, the exercise of the executive power and named a new ministry. Next day he issued a manifesto, assigning as the reason for his act that the President, Señor Sanclemente, was, by reason of his residing away from the capital, unable to attend to his public duties, and that it was desirable to end the civil war then going on. The new minister of foreign affairs, Señor Martinez Silva, notified the diplomatic corps of his appointment, but soon afterwards the minister of foreign affairs of President Sanclemente gave notice that the government of the latter was still in existence, at the same time communicating to the diplomatic corps a protest of President Sanclemente, who was then held as a prisoner by a Marroquin force at his temporary residence a day's journey from the capital. The diplomatic corps, through its secretary, advised Señor Martinez Silva, orally, of the receipt of his note, and of its intention to await developments. Señor Palacio, minister of government of President Sanclemente, who was taken prisoner with the latter, was brought to Bogota.

September 8, 1900, Mr. Hill, Acting Secretary of State, sent to Mr. Hart, United States minister at Bogota, the following instruction:<sup>c</sup>

<sup>a</sup>Mr. Seward, Sec. of State, to Mr. Burton, May 29, 1861, MS. Inst. Colombia, XVI. 1; same to same, July 18, 1861, id. 7; Sept. 10, 1861, id. 12; Sept. 24, 1861, id. 16; Dec. 6, 1861, id. 18; Mr. Burton to Mr. Seward, Dec. 25, 1861, MS. Despatches, Colombia; same to same, Jan. 7, 1862, id.; Mr. Seward to Mr. Burton, Jan. 29, 1862, MS. Inst. Colombia, XVI. 24; same to same, Feb. 19, 1862, id. 27; June 30, 1863, id. 76. The recognition of a provisional government in Salvador was deferred on similar grounds. (Mr. Seward, Sec. of State, to Mr. Partridge, Nov. 28, 1863, Jan. 2, 1864, MS. Inst. Am. States, XVI. 396, 399.)

<sup>b</sup>Mr. Seward, Sec. of State, to Mr. Sullivan, Aug. 17, 1867, MS. Inst. Colombia, XVI. 231.

<sup>c</sup>For. Rel. 1900, 410.

"The policy of the United States, announced and practiced upon occasion for more than a century, has been and is to refrain from acting upon conflicting claims to the *de jure* control of the executive power of a foreign state; but to base the recognition of a foreign government solely on its *de facto* ability to hold the reins of administrative power. When, by reason of revolution or other internal change not wrought by regular constitutional methods, a conflict of authority exists in another country whereby the titular government to which our representatives are accredited is reduced from power and authority, the rule of the United States is to defer recognition of another executive in its place until it shall appear that it is in possession of the machinery of the state, administering government with the assent of the people thereof and without substantial resistance to its authority, and that it is in a position to fulfill all the international obligations and responsibilities incumbent upon a sovereign state under treaties and international law. When its establishment upon such *de facto* basis is ascertained, it is recognized by directing the United States representative formally to notify its proper minister of his readiness to enter into relations with it, and thereafter by the still more formal process of receiving and issuing new credentials for the respective diplomatic agents.

"Pending such *de facto* entrance into relations, the agents of the United States have the right to demand of any local authority assuming to exercise power and control protection of American life and property from injury or damage and respect for all American rights secured by treaty and international law, and their so doing is to be held to be an act of necessity, without prejudice to the ulterior question of international relations as between one sovereign government and another, and equally without prejudice to our sovereign right to exact reparation from the responsible perpetrators of any wrong toward this Government, its citizens, and their interests.

"Although the probability of interference with telegraphic communications in Colombia may delay your reception of a cabled message, I have embodied the essentials of this instruction in the following cipher message telegraphed to you this day:

"When new government is in possession of machinery of administration, maintaining order, executing the laws in Colombia with general assent of the people, and responsibly fulfilling international obligations, you may notify readiness to enter into relations."

Notwithstanding the efforts of President Sanclemente's adherents to invoke popular support, they were unable to take any effective measures toward his restoration, and the Marroquin government, aided by the apparent decline of the civil war, seemed daily to gain strength. September 15, 1900, the ministers of France, Germany, Great Britain, and Spain, joining with the minister of the United States, each sent to

Señor Martinez Silva a formal acknowledgment of the note wherein he notified them of his appointment and of the assumption by the vice-president of the executive power, thus establishing relations with the new Government. The papal delegate refrained from taking a similar step, since he was awaiting instructions. The coup d'état seemed to have met with general acquiescence, though the previous revolutionary disturbances continued.<sup>a</sup>

## 8. CENTRAL AMERICA.

## § 50.

November 8, 1855, Mr. Marcy, Secretary of State, referring to the government then lately set up in Nicaragua, with  
 Nicaragua: Rivas-  
 Walker Govern- Don Patricio Rivas as president, and William Walker  
 ment. as commander-in-chief of the army, wrote to Mr. Wheeler, then United States minister to that republic, as follows:

"It appears that a band of foreign adventurers has invaded that unhappy country, and, after gaining recruits from among the residents, has by violence overturned the previously existing government, and now pretends to be in possession of the sovereign authority. The knowledge we have of their proceedings does not authorize the President to recognize it as the *de facto* government of Nicaragua, and he can not hold, or permit you to hold, in your official character, any political intercourse with the persons now claiming to exercise the sovereign authority of that state. It appears to be no more than a violent usurpation of power, brought about by an irregular self-organized military force, as yet unsanctioned by the will or acquiescence of the people of Nicaragua. It has more the appearance of a successful marauding expedition than of a change of government or rulers.

"Should the mass of the people of Nicaragua be unwilling or unable to repel this inroad or shake off this usurpation, and ultimately submit to its rule, then it may become *de facto* a government, and responsible for the outrages which have been committed upon the rights and persons of American citizens. \* \* \*

"The President instructs you to abstain from any official intercourse with the persons now exercising a temporary control over some parts of Nicaragua. In such a dubious state of affairs you can not be

<sup>a</sup> For Rel. 1900, 412. See also President McKinley's annual message of December 3, 1900, in which it is stated that as the act of Vice-President Marroquin, "in assuming the reins of government during the absence of President Sanclemente from the capital," met with "no serious opposition," the United States minister, following the precedents in such cases, "entered into relations with the new *de facto* Government."

expected to act in your official character until you receive instructions from your Government, but you will be entitled to all the immunities of a minister if you do not act to forfeit them. You will remain in the country and keep your Government well advised of the actual condition of affairs therein. You will observe great circumspection in your conduct. You can not retain a right to the privileges of a minister if you intermeddle in the concerns of any of the parties."<sup>a</sup>

Before receiving this instruction Mr. Wheeler had recognized the Government.<sup>b</sup>

He was therefore directed "at once" to "cease to have any communication with the assumed rulers" of Nicaragua and, until he should receive further instructions, to observe the course enjoined on the 8th of November.<sup>c</sup>

December 19, 1855, Señor Parker H. French transmitted to Mr. Marcy a copy of credentials from Don Patricio Rivas, designated as provisory president of the Republic of Nicaragua, accrediting him as minister plenipotentiary to the United States, and requested an interview preparatory to the presentation of his credentials to the President. Mr. Marcy on the 21st of December replied that the President did not yet see cause to establish diplomatic intercourse with the persons then claiming to exercise political power in Nicaragua, and that he did not deem it proper at that time to receive anyone as a minister from that Republic.<sup>d</sup> This decision was repeated February 7, 1856.<sup>e</sup> Meanwhile, Mr. Wheeler was instructed to obtain "the most accurate information in regard to the actual political condition" of Nicaragua, some of the accounts representing "that the present political organization is satisfactory to the people," while others indicated "that it has no foundation in the hearts of the people, who would very generally shake off the power of Walker if it were possible for them to do so, and that terror is its sole foundation."<sup>f</sup> Mr. Wheeler's reports were highly favorable to the Government.<sup>g</sup> May 14, 1856, a new minister, the reverend licentiate Don Augustin Vigil, presented credentials from President Rivas as envoy from the Republic of Nicaragua to the United States.<sup>h</sup> He was duly received in that character.

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<sup>a</sup> H. Ex. Doc. 103, 34 Cong. 1 sess. 35.

<sup>b</sup> *Ibid.* 39.

<sup>c</sup> Mr. Marcy to Mr. Wheeler, Dec. 7, 1855, H. Ex. Doc. 103, 34 Cong. 1 sess. 51.

<sup>d</sup> Mr. Cushing, Attorney-General, to Mr. McKeon, U. S. Dist. Attorney, Dec. 24, 1855, H. Ex. Doc. 103, 34 Cong. 1 sess. 14; Mr. Marcy to Mr. French, Dec. 21, 1855, *id.* 57.

<sup>e</sup> Mr. Marcy to Mr. French, Feb. 7, 1856, H. Ex. Doc. 103, 34 Cong. 1 sess. 76.

<sup>f</sup> Mr. Marcy, Sec. of State, to Mr. Wheeler, Jan. 8, 1856, H. Ex. Doc. 103, 34 Cong. 1 sess. 68.

<sup>g</sup> Mr. Wheeler to Mr. Marcy, Feb. 26, 1856, H. Ex. Doc. 103, 34 Cong. 1 sess. 76-77; same to same, March 17, 1856, *id.* 121; March 31 and April 17, 1856, *id.* 125.

<sup>h</sup> H. Ex. Doc. 103, 34 Cong. 1 sess. 149.

With reference to this transaction President Pierce, in a special message to Congress of May 15, 1856, made the following statement:

"It is the established policy of the United States to recognize all governments without question of their source, or organization, or of the means by which the governing persons attain their power, provided there be a government *de facto* accepted by the people of the country, and with reserve only of time as to the recognition of revolutionary governments arising out of the subdivision of parent states with which we are in relations of amity. We do not go behind the fact of a foreign government's exercising actual power to investigate questions of legitimacy; we do not inquire into the causes which led to a change of government. To us it is indifferent whether a successful revolution has been aided by foreign intervention or not; whether insurrection has overthrown existing governments and another has been established in its place, according to preexisting forms, or in a manner adopted for the occasion by those whom we may find in the actual possession of power. All these matters we leave to the people and public authorities of the particular country to determine; and their determination, whether it be by positive action or by ascertained acquiescence, is to us a sufficient warranty of the legitimacy of the new government.

"During the sixty-seven years which have elapsed since the establishment of the existing government of the United States, in all which time this Union has maintained undisturbed domestic tranquillity, we have had occasion to recognize governments *de facto*, founded either by domestic revolution or by military invasion from abroad, in many of the governments of Europe.

"It is the more imperatively necessary to apply this rule to the Spanish-American republics, in consideration of the frequent and not seldom anomalous changes of organization or administration which they undergo, and the revolutionary nature of most of the changes.

\* \* \*

"When, therefore, some time since, a new minister from the Republic of Nicaragua presented himself, bearing the commission of President Rivas, he must and would have been received as such, unless he was found on inquiry subject to personal exception, but for the absence of satisfactory information upon the question whether President Rivas was *in fact* the head of an established government of the Republic of Nicaragua, doubt as to which arose not only from the circumstance of his avowed association with armed emigrants recently from the United States, but that the proposed minister himself was of that class of persons, and not otherwise or previously a citizen of Nicaragua.

"Another minister from the Republic of Nicaragua has now presented himself, and has been received as such, satisfactory evidence



appearing that he represents the Government *de facto*, and, so far as such exists, the Government *de jure* of that Republic.

“That reception, while in accordance with the established policy of the United States, was likewise called for by the most imperative special exigencies, which require that this Government shall enter at once into diplomatic relations with that of Nicaragua. In the first place, a difference has occurred between the Government of President Rivas and the Nicaragua Transit Company, which involves the necessity of inquiry into rights of citizens of the United States, who allege that they have been aggrieved by the acts of the former, and claim protection and redress at the hands of their Government. In the second place, the interoceanic communication by the way of Nicaragua is effectually interrupted, and the persons and property of unoffending private citizens of the United States in that country require the attention of their Government. Neither of these objects can receive due consideration without resumption of diplomatic intercourse with the Government of Nicaragua.”<sup>a</sup>

The recognition of the Rivas-Walker government was a few months later withdrawn. On July 24, 1856, President Rivas accredited a new minister to the United States. When the preliminary copy of his credentials was presented, Mr. Marcy, in the name of the President, replied that the troubled state of affairs in Nicaragua rendered it uncertain who possessed the civil authority of the state, if, indeed, there was any established authority entitled “to be considered as a real or *de facto* government.” “It is not, I presume,” said Mr. Marcy, “unknown to you that the right of Don Patricio Rivas to exercise the functions of President of Nicaragua is seriously contested. The reception of a diplomatic agent by the President from either of the contestants for the chief magistracy would necessarily involve a decision in regard to that controversy by the Executive of the United States, which, in consequence of the imperfect and conflicting statements of the political condition of that country, he is not now pre-

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<sup>a</sup> H. Ex. Doc. 103, 34 Cong., 1 sess., 5-6. In answer to a complaint made by Mr. Osma, the Minister from Peru, of President Pierce's recognition of the Rivas-Walker Government in Nicaragua, Mr. Marcy said: “The United States regretted as much as Peru could do the unhappy political dissensions which prevailed for a long time in that State, and the disastrous consequences which have resulted from them. One political party, for the purpose of obtaining advantage over another, sought foreign aid, and invited Walker, with his associates, to join its ranks. The invitation was accepted. So long as there was a contest for power, so long as any question could be raised as to the persons in whose hands the Government, actual or *de facto*, had fallen, this Government did nothing which could afford any pretense for complaint to any party in the State of Nicaragua, or to any foreign power.” (Mr. Marcy, Sec. of State, to Mr. Osma, Sept. 24, 1856, MS. Notes to Peruvian Leg. I. 148.)

That the United States recognize foreign governments as existing *de facto*, without regard to their forms, see opinion of Mr. Cushing, Attorney-General, 1855, 7 Op. 582.

pared to make. I am, therefore, directed to acquaint you that he declines to receive you as minister from Nicaragua."<sup>a</sup>

"Your dispatches of the 10th of November, Nos. 5 and 6, have been received. In your No. 5 you announce that a revolution has taken place in Costa Rica, which was effected by the mere display of military force, unresisted, and without the effusion of blood. You further announce that in that movement the President, Señor Castro, was deposed, and the first provisional substitute, Señor Jimenez, had assumed the executive power. The further transactions mentioned are an acquiescence of the several provinces, the suspension of the constitution, and the call of a national convention to adopt a new constitution. As a consequence of these events, you have recognized the new President, subject to directions on the occasion from the President of the United States.

"It does not belong to the Government or people of the United States to examine the causes which have led to this revolution, or to pronounce upon the exigency which they created. Nevertheless, great as that exigency may have been, the subversion of a free republican constitution, only nine years old, by military force, in a sister American Republic, cannot but be an occasion of regret and apprehension to the friends of the system of republican government, not only here, but throughout the world.

"It only remains to say that the course which you have pursued is approved, insomuch as it appears that there is not only no civil war, but no Government contending with the one which has been established."

Mr. Seward, Sec. of State, to Mr. Blair, Dec. 1, 1868, Dip. Cor. 1868, II. 337.

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<sup>a</sup>Mr. Marcy, Sec. of State, to Señor Don Antonio José de Irisarri, Oct. 28, 1856, MS. Notes to Cent. Am. I. 119.

Oct. 18, 1886, Mr. Castellon, minister of foreign relations of Nicaragua, addressed to Mr. Hall, the minister of the United States, the following note: "I have the honor to inform you that having transcribed to the minister of the treasury your esteemed note of the 22d September, together with a copy of the bond accompanying it, I have received the reply of which the following is a copy:

"I have had the honor to receive the communication that you were pleased to address me on the 8th inst., in which is transmitted the note of the minister of the United States, dated the 22d of September, inquiring as to the authenticity and validity of the supposed bond of this Republic issued, as it is pretended, in conformity with a decree of the Government of Nicaragua of the 28th of August, 1856. A textual copy of the bond accompanies the above-mentioned note.

"The mentioned decree is not known to the Government, nor does it exist on the records of our loans, nor is the obligation to which it refers a legitimate debt of the Republic. By the dates that are cited I perceive that it must be the work of the filibusters of Walker, who were here about that time, and whose history of depredation and rapine is well known. Of course the foreign usurpers never had any right to compromise the credit of this Republic.'" (For. Rel. 1887, 76. This reply was referred to by Mr. Day, Assist. Sec. of State, in a letter to Mr. Taliaferro, Oct. 9, 1897, 221 MS. Dom. Let. 409.)

“The peace of Central America has again been disturbed through a revolutionary change in Salvador, which was not recognized by other states, and hostilities broke out between Salvador and Guatemala, threatening to involve all Central America in conflict and to undo the progress which had been made toward a union of their interests. The efforts of this Government were promptly and zealously exerted to compose their differences, and through the active efforts of the representative of the United States a provisional treaty of peace was signed August 26, whereby the right of the Republic of Salvador to choose its own rulers was recognized. General Ezeta, the chief of the provisional government, has since been confirmed in the Presidency by the assembly, and diplomatic recognition duly followed.”

President Harrison, Annual Message, Dec. 1, 1890.

July 17, 1893, the minister of the United States in Nicaragua was instructed “to report without delay when the control of the executive power of Nicaragua shall pass with general acquiescence to any government, and to maintain an attitude of impartiality during the deeply deplored continuance of civil dissensions in that country.”<sup>a</sup>

By a treaty concluded at Amapala, Honduras, June 20, 1895, and of which the ratifications were exchanged on the 15th of September, 1896, the Republics of Honduras, Nicaragua, and Salvador agreed to form a single political organization for the exercise of their external sovereignty, with the title of the Greater Republic of Central America. The President of the United States recognized this organization by receiving a minister from it on December 24, 1896, such recognition being given “upon the distinct understanding that the responsibility of each of these Republics toward the United States remains wholly unaffected.”<sup>b</sup> The United States, however, remained without a representative to the Greater Republic of Central America, appropriations continuing to be made for a minister to Nicaragua, Costa Rica, and Salvador, and a minister to Guatemala and Honduras,<sup>c</sup> and the two ministers continuing to be so accredited. Owing to the compact of June 20, 1895, whereby the members of the Greater Republic of Central America had surrendered to the representative Diet the right to send and receive diplomatic agents, the minister to Nicaragua, Costa Rica, and Salvador was received only by Costa Rica; and the minister to Guatemala and Honduras only by Guatemala.<sup>d</sup> Subsequently a permanent constitution was formed under the name of “The United States of Central

<sup>a</sup> Mr. Gresham, Secretary of State, to Mr. Baker, minister to Nicaragua, tel., July 17, 1893, For. Rel. 1893, 203; same to same, Aug. 15, 1893, Id. 212.

<sup>b</sup> For. Rel. 1896, 366-371, 390-392, 395.

<sup>c</sup> 29 Stat. 579; 30 Stat. 262. See, also, Annual Message of the President, Dec. 6, 1897.

<sup>d</sup> President's Annual Message, Dec. 5, 1898, p. 22.

America." It was signed by representatives of the three States, at Managua, August 27, 1898, and was to take effect November 1. On that day, pursuant to its provisions, a provisional executive council was installed at Amapala, to last till a president should be elected by the people. Almost immediately, however, revolutionary movements occurred, and particularly a separatist movement in Salvador. November 29, 1898, the provisional executive council announced the dissolution of the union, and similar announcements by the individual States immediately followed, each one resuming its independent sovereignty.<sup>a</sup>

"This was followed by the reception of Minister Merry by the republics of Nicaragua and Salvador, while Minister Hunter in turn presented his credentials to the Government of Honduras, thus reverting to the old distribution of the diplomatic agencies of the United States in Central America for which our existing statutes provide. A Nicaraguan envoy has been accredited to the United States."<sup>b</sup>

#### 9. MEXICO.

##### § 51.

President Pierce, in a special message of May 15, 1856, observed that "five successive revolutionary governments" had **Comonfort, Zuloaga, and Miramon** made their appearance in Mexico "in the course of a few months, and been recognized successively each as the political power of that country by the United States."<sup>c</sup> On the very day on which this message was published, Ignatius Comonfort, as vice-president of the Republic, in the exercise of extraordinary powers, proclaimed a provisional constitution. In the following year the present federal constitution of Mexico was adopted. Comonfort took an oath to support it, and was elected constitutional president for the four years beginning December 1, 1857. Within a month, as the result of a revolution, he was driven from power, and a military government was set up by General Zuloaga. This government was recognized by the entire diplomatic corps, including Mr. Forsyth, the minister of the United States, without awaiting instructions. No answer appears to have been made to the dispatch in which Mr. Forsyth reported this action.<sup>d</sup> Zuloaga, however, was soon expelled by

<sup>a</sup> For. Rel. 1898, 173-178.

<sup>b</sup> President McKinley, Annual Message, Dec. 5, 1899. Dec. 6, 1898, Mr. Hay, Secretary of State, telegraphed to Mr. Hunter that, as the union of the United States of Central America had apparently broken up without restoration of the Diet, he should address the executive of Honduras, offering to present his original credentials. (For. Rel., 1899, 355.) Dec. 20, 1898, Mr. Hunter, in order to make sure that his credentials would be received, transmitted by mail to the minister of foreign affairs of Honduras his original credentials and letter to President Bonilla. (For. Rel., 1898, 356.) He was duly advised of his recognition as envoy extraordinary and minister plenipotentiary to the Republic of Honduras. The decree so recognizing him was dated January 19, 1899. (For. Rel. 1899, 357-360.)

<sup>c</sup> H. Ex. Doc. 103, 34 Cong. 1 sess. 5.

<sup>d</sup> Moore, Int. Arbitrations, II. 1289.

General Miramon, with whom the foreign ministers also entered into relations. But in June, 1858, Mr. Forsyth, dissatisfied with the state of his negotiations, broke off diplomatic relations with the Miramon government till he should ascertain the decision of the President. President Buchanan approved his decision, and directed him to demand his passports and return to the United States.

Meanwhile, Benito Juarez, who as chief justice of the Republic became the constitutional president on the deposition of Comonfort, but who as leader of the Liberal party was compelled to fly from the capital, had after many vicissitudes succeeded in establishing a government at Vera Cruz. On the strength of a report of a confidential agent, President Buchanan sent out a new minister, Mr. McLane, with discretionary authority to recognize the government of President Juarez if, on his arrival in Mexico, he should find it entitled to recognition according to the established practice of the United States. Mr. McLane was specifically instructed that it was not an essential condition of the recognition of a government that it should be in possession of the capital, but that it was enough if it was "obeyed over a large majority of the country and the people, and is likely to continue."<sup>a</sup> Mr. McLane, on April 7, 1859, presented his credentials to President Juarez, and thus recognized his government, which he pronounced to be "the only existing government of the Republic."<sup>b</sup>

The government of Maximilian in Mexico never was recognized by the United States, the recognition of the Juarez government continuing throughout the period of the French intervention.<sup>c</sup>

The Mexican law for the settlement of the national debt, proclaimed June 18, 1883, Art. I, sec. 5, reads: "We can not recognize, and for this reason there are not to enter into this conversion, the debts which emanated from the government which pretended to exist in Mexico from Dec. 17, 1857, to Dec. 24, 1860, and from June 1, 1863, to June 21, 1867." (Mr. Adey, Second Assist. Sec. of State, to Mr. Banks, Dec. 10, 1897, MSS. Dept. of State.)

<sup>a</sup> Mr. Cass, Secretary of State, to Mr. McLane, Mar. 7, 1859, MS. Inst. Mexico, XVII. 213; also, same to same, May 25, 1859, id. 232.

<sup>b</sup> Curtis, *Life of Buchanan*, II. 215.

See, also, Mr. Cass, Secretary of State, to Mr. Dallas, May 12, 1859, MS. Inst. Gr. Britain, XVII. 190, referring to the recognition of the Juarez government by the United States, and deprecating the employment against it of forcible measures, which Great Britain was reported then to contemplate for the collection of claims against Mexico, although the British minister still maintained relations with the Miramon government at the capital.

<sup>c</sup> Mr. Seward, Sec. of State, May 16, 1864, MS. Inst. Papal States, I. 75; Mr. Seward, Sec. of State, to Mr. Bigelow, March 13, 1865, MS. Inst. France, XVII. 296; Mr. Seward, Sec. of State, to the Marquis de Montholon, Memorandum, July 18, 1865, MS. Notes to French Leg. VIII. 140; Mr. Seward, Sec. of State, to Mr. Scudder, May 4, 1866, 73 MS. Dom. Let. 32; Correspondence and Memoranda, Dip. Cor. 1865, III. 484-489.

November 28, 1876, General Porfirio Diaz issued a proclamation announcing himself provisional president of the republic of Mexico, under the plan of Tuxtepec.<sup>a</sup> January 19, 1877, intelligence having been received at Washington of the defeat of the forces of the rival claimants, Mr. Fish suggested that if this should be confirmed by similar tidings received at the City of Mexico, General Diaz "would have no important adversary in arms, and might be regarded as the actual ruler of the country." The question of recognizing his government was under the circumstances left to the discretion of the American minister.<sup>b</sup> In view, however, of the unsettled state of affairs in Mexico, and especially of the existence of controversies between the two countries growing out of troubles on the Rio Grande frontier, it was afterwards determined that the government of the United States, although it was "accustomed to accept and recognize the results of a popular choice in Mexico and not to scrutinize closely the regularity or irregularity of the methods" by which those results were brought about, would in the particular instance "wait before recognizing General Diaz as President of Mexico until it shall be assured that his election is approved by the Mexican people, and that his administration is possessed of stability to endure and of disposition to comply with the rules of international comity and the obligations of treaties."<sup>c</sup> The Diaz government was officially recognized by Germany, May 30, 1877; by Salvador and Guatemala, June 7; by Spain, June 16, and soon afterwards similar action was taken by Italy.<sup>d</sup> These were all the powers then represented in Mexico, except the United States. In his annual message of December 3, 1877, President Hayes stated that it had been "the custom of the United States, when such [revolutionary] changes of government have heretofore occurred in Mexico, to recognize and enter into official relations with the *de facto* government as soon as it should appear to have the approval of the Mexican people and should manifest a disposition to adhere to the obligations of treaties and international friendship," but that "in the present case such official recognition has been deferred by the occurrences on the Rio Grande border."<sup>e</sup> Official recognition was given early in May, 1878, when a formal reception was accorded to a new minister from Mexico, and the President formally replied to the letter of General Diaz announcing the recall of the previous representative.<sup>f</sup>

<sup>a</sup> Mr. Foster, minister to Mexico, to Mr. Fish, Sec. of State, Nov. 29, 1876, For. Rel. 1877, 385.

<sup>b</sup> For. Rel. 1877, 394.

<sup>c</sup> Mr. F. W. Seward, acting Sec. of State, to Mr. Foster, May 16, 1877, For. Rel. 1877, 404. See, also, Mr. Fish, Sec. of State, to Mr. Foster, Feb. 12, 1877, MS. Inst. Mexico, XIX. 321; Mr. Evarts, Sec. of State, to Mr. Foster, March 27, 1877, id. 327.

<sup>d</sup> For. Rel. 1877, 409, 426.

<sup>e</sup> Id. p. xii.

<sup>f</sup> For. Rel. 1878, 675; Mr. Evarts, Sec. of State, to Mr. Foster, May 8, 1878, MS. Inst. Mexico, XIX. 408.

## 10. VENEZUELA.

## § 52.

The minister of the United States at Caracas in 1862 having without **Paez Government.** authority recognized the government of General Paez, he was instructed to inform that government that his action was disavowed and annulled. He was also instructed to explain that this decision did not imply "any hostility, or even any disfavor" to the government, much less an opinion that it was "not founded in justice or in right," or that it had not been successfully established. The object of the United States was "to manifest the conviction" that it belonged "to the Venezuelan state to establish and maintain its own government without intervention, intrusion, or even influence, from foreign nations, and especially from the United States," and that as yet there had been seen "no such conclusive evidence" that the Paez government was "the act of the Venezuelan state as to justify an acknowledgment thereof." The United States observed with regret "an unquiet and revolutionary spirit pervading the republican states on this continent, involving them continually in desolating and exhausting civil wars, ultimately subversive not only of national independence, but even of liberty itself." The United States therefore deemed it a duty "to discourage that spirit so far as it can be done by standing entirely aloof from all such domestic controversies until in each case the state immediately concerned shall unmistakably prove that the government which claims to represent it is fully accepted and peacefully maintained by the people thereof."<sup>a</sup>

"The revocation [of the U. S. minister's act of recognition] was the more reluctantly made because General Paez, by his character, had already most favorably impressed the government and people of the United States, and so far as their wishes and feelings might be manifested, consistently with the law of nations, they actually desired the consolidation of the national authority of Venezuela under the auspices of his government. \* \* \* It is only necessary now to add, or rather to state more distinctly, what has been before intimated, that, for a considerable period, considerations quite foreign from the domestic condition of Venezuela have hitherto forbidden the United States from recognizing new authorities arising in the Spanish-American states through domestic revolution, and that the delay in regard to Venezuela is to be understood as implying no hostility, disfavor, or distrust in regard to the government of General Paez."

Mr. Seward, Sec. of State, to Mr. Culver, March 9, 1863, MS. Inst. Venezuela, I. 266.

The remains of General Paez, who after his downfall came to the United States, where he died and was buried, were sent by the government in 1888 on a public vessel to Caracas, where they were received by the Venezuelan Government. (For. Rel. 1888, II. 1643-1645.)

<sup>a</sup> Mr. Seward, Sec. of State, to Mr. Culver, Nov. 19, 1862, MS. Inst. Venezuela, I. 250. See, as to the Paez government, Moore, Int. Arbitrations, IV. 3558.

The government of President Falcon was recognized late in the summer of 1864, after a probation of nearly a year.<sup>a</sup> **Falcon Government.** After the overthrow of the Falcon government in 1868,<sup>b</sup> another period of waiting was entered upon till one of the rival claimants should prove his title to recognition.<sup>c</sup> Guzman Blanco was ultimately successful.

On his restoration to power by the revolution of 1879, General Guzman Blanco convoked a "congress of plenipotentiaries," consisting of representatives from the several **Revolution of 1879;** **Guzman Blanco.** States of Venezuela, which formed a provisional government and elected him provisional president. He was soon recognized by the diplomatic representatives of Brazil, England, France, Germany, Italy, and Spain.<sup>d</sup> The United States, however, deferred its recognition, Mr. Evarts, who was then Secretary of State, taking a position similar to that which he had previously assumed with reference to the new government of Mexico. The new administration of Venezuela, he observed, was "not understood to have gained power by any constitutional process of election or endorsement," and, while "its claims to *de facto* recognition" were "weighty," it was "thought best to defer formal intercourse" till assurance could be had that "such a step will not only rest on the popular will of Venezuela, but will also be beneficial to the relations between the United States and that country. Good faith in the observance of international obligations is the first essential towards the maintenance of such relations. At present there is no indication that any change for the better has taken place, either as regards the payment of the indemnity installments, now for several months in default, or the security of the rights of citizens of the United States sojourning in Venezuela." The American minister was therefore to "maintain a considerate and conciliatory attitude" in his "unofficial relations with the new government," with a view "to bring about with all convenient speed a proper understanding upon the pending issues as the necessary preface to formal recognition;"<sup>e</sup> and he was to "cooperate in all proper ways (short of formal recognition until so instructed) in the good work of preserving intact the friendly relations between the two countries."<sup>f</sup>

<sup>a</sup> Mr. Seward, Sec. of State, to Mr. Culver, Aug. 24, 1864, MS. Inst. Venezuela, I. 309; same to same, Oct. 21, 1863, id. 288.

<sup>b</sup> Moore, Int. Arbitrations, II. 1693 et seq.

<sup>c</sup> Mr. Seward, Sec. of State, to Mr. Bruzual, Aug. 27, 1868, MS. Notes to Venezuelan Leg., I. 136.

<sup>d</sup> For. Rel. 1879, pp. 1041, 1043.

<sup>e</sup> Mr. Evarts, Sec. of State, to Mr. Baker, April 8, 1879, MS. Inst. Venezuela, III. 61.

<sup>f</sup> Mr. Evarts, Sec. of State, to Mr. Baker, April 10, 1879, MS. Inst. Venezuela, III. 63.

"As a general rule of foreign policy, obtaining since the foundation of our government, the recognition of a foreign government by this is not dependent on right, but on fact. For this reason, when a change occurs in the administration of a nation,



"It is understood that the proceedings of the congress of plenipotentiaries, by which Gen. Guzman Blanco became provisional president for a term of years, invested him with the presidential functions *de facto*, notwithstanding the absence of any constitutionally elective choice by popular suffrage. This *de facto* administration has entire control of the executive and governmental machinery of Venezuela, and rules, not merely without opposition, but with what seems to be the positive acquiescence of the governed; and, under the general usage of nations, no legitimate obstacle on that score exists to its recognition.

"But the capacity of a state, in itself, for recognition, and the fact of recognition by other states, are two different things. Recognition is not an act wholly depending on the constitutionality or completeness of a change of government, but is not infrequently influenced by the needs of the mutual relations between the two countries. When radical changes have taken place in the domestic organization of the country, or when they seem to be contemplated in its outward relations, it is often a matter of solicitude with this government that some understanding should exist that the rights acquired by our citizens, through the operation of treaties and other diplomatic engagements, shall not be affected by the change. In other words, while the United States regard their international compacts and obligations as entered into with *nations* rather than with political *governments*, it behooves them to be watchful lest their course toward a government should affect the relations to the nation. Hence it has been the customary policy of the United States to be satisfied on this point; and doing so is in no wise an implication of doubt as to the legitimacy of the internal change which may occur in another state.

"Pending formal recognition, however, it is not to be supposed that any of the customary business relations or civil courtesies are abruptly terminated. The actual formula of recognition is unmis- takable, and, short of that evident step, the diplomatic fiction of 'official' intercourse, or 'unofficial' action is elastic enough to admit of continuing ordinary intercourse, for the most part, without rupture of any of its varied parts.

"The Department, in the light of the preceding considerations, is constrained to regard your action [in staying away from a banquet given by President Guzman Blanco] as based on the mistaken assumption that your position is one of non-intercourse rather than of 'official' or 'unofficial' and friendly intercourse; and that, in holding

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and the new authorities are in unopposed possession of the full machinery of government with duly appointed public officers acting in its name, and evincing the purpose as well as the power to carry out the international obligations of the state, recognition would follow as a matter of course, whatever might be the personal character of the head of the new government, or whatever the nature of his rule, so long as no considerations of policy directly affecting the relations between his country and this intervene to postpone such a result." (Mr Hunter, Acting Sec., to Mr. Baker, Oct. 3, 1879, MS. Inst. Venezuela, III. 79.)

a conference with the President of the Republic and entering, as you did, into the unnecessary explanation of the secret motives of your conduct, you committed a breach of diplomatic usage. Had you desired to attend the entertainment, an intimation to the minister of foreign affairs that you attended in a friendly and informal capacity merely, pending the receipt of instructions to proceed to formal recognition, would have abundantly guarded your official responsibility. Had you had personal reasons for not wishing to attend, the usages of polite intercourse were adequate for the expression of your regret."

Mr. Evarts, Sec. of State, to Mr. Baker, June 14, 1879, MS. Inst. Venezuela, III. 67.

In his No. 188, of Dec. 25, 1879, Mr. Baker reported the reception of a note from the newly appointed minister of foreign relations of Venezuela, requesting him to regard as not received a note previously sent officially informing him of the minister's appointment. Mr. Evarts replied:

"I am not disposed to regard this note as possessing of itself alone the exceptional gravity you attach to it. It is not in any sense a personal incivility toward you. Your relations with the Venezuelan government being purely unofficial and friendly merely, you can not expect that government to place you on the same official footing as the representatives, duly accredited, of powers maintaining full official relations with the government of General Guzman Blanco. That an official announcement was sent to you in common with them may have been an oversight, which the minister hastened to rectify by resorting to the diplomatic fiction of regarding the communication as *non avenue*, a friendly and proper step and not as liable to be construed offensively as would have been the formal recall of the paper from your files.

"The minister's note is not understood as foreshadowing the termination of the unofficial relations you have so long held with his government. Only an interruption of actual intercourse on the basis heretofore made clear to you by the instructions of this Department would present a question of recalling the representative of the United States from Venezuela." (Mr. Evarts, Sec. of State, to Mr. Baker, Jan. 22, 1880, MS. Inst. Venezuela, III. 87.)

In the spring of 1880, the Venezuelan Congress having met and elected General Guzman Blanco President, it was decided, notwithstanding that the questions relating to the indemnity and to claims had not been settled, to give him formal recognition. "By this proceeding [the election of Gen. Guzman Blanco as President by the Venezuelan Congress] the sanction of the people of Venezuela is," said Mr. Evarts, "deemed to have been as freely and completely given to the administration of President Guzman Blanco as can be reasonably expected in countries so subject to sudden and violent political change as are those of Spanish America, and no good cause could longer be perceived for withholding the due recognition of the government so sanctioned and inaugurated."<sup>a</sup>

<sup>a</sup> Mr. Evarts, Sec. of State, to Mr. Baker, April 27, 1880, MS. Inst. Venezuela, III. 99. Mr. Comacho was officially recognized as *chargé d'affaires* on April 20, 1880, by a note addressed to him by Mr. Evarts, as Secretary of State, on that day. (MS. Notes to Venezuela, I. 197.)

In 1892 the minister of the United States was instructed to recognize the *de facto* government of General Crespo if it was **Crespo Government.** "accepted by the people, in possession of the power of the nation, and fully established."<sup>a</sup>

August 7, 1899, "the insurgent faction in the state of Los Andes under Gen. Cipriano Castro" was reported to be **Castro government.** "completely defeated." September 5, however, the revolutionists were "gaining strength."<sup>b</sup> September 14 President Andrade left Caracas to take command of the government forces in the field.<sup>c</sup> September 14 Valencia was taken by the revolutionists, and the president returned to Caracas.<sup>d</sup> September 23 it was the general opinion at Caracas that the government would fall.<sup>e</sup> October 20 the president abruptly left Caracas, and embarked at La Guaira for a place unknown. The vice-president assumed power and appointed a new cabinet, the previous one having resigned; but, owing to the unconstitutional manner of the president's departure, there were doubts as to the validity of the vice-president succeeding him. In response to an inquiry whether the government should be recognized, the following instruction was given: "Wait events. Can not assume to judge conditional title. Test of recognition is complete regency of affairs by *de facto* government capable of fulfilling international obligations. Meanwhile transact necessary business with locally responsible authorities."<sup>f</sup>

October 22 General Castro arrived in Caracas and "was heartily welcomed."<sup>g</sup> Next day the "acting vice-president" turned over the government to him.<sup>h</sup> On the night of October 26 General Hernandez, who had been fighting the Andrade government and supporting General Castro, left Caracas with about 2,000 men to begin an uprising against the *de facto* government.<sup>i</sup> The *de facto* government was then "fairly well established."<sup>j</sup> The minister of the United States requested authority to recognize it when the proper time had arrived. The Department of State replied: "If the provisional government is effectively administering government of nation and in position to fulfill international obligations, you will enter into *de facto* relations."<sup>k</sup>

<sup>a</sup> Mr. Foster, Sec. of State, to Mr. Scruggs, telegram, Oct. 12, 1892, For. Rel. 1892, p. 635. Mr. Scruggs telegraphed notice of the formal recognition of the new government, Oct. 23, 1892. (For. Rel. 1892, p. 635.)

<sup>b</sup> For. Rel., 1899, 793.

<sup>c</sup> Id. 795.

<sup>d</sup> Id. 796-797.

<sup>e</sup> Id. 797.

<sup>f</sup> Mr. Hay, Secretary of State, to Mr. Loomis, minister to Venezuela, telegram, October 23, 1899, For. Rel., 1899, 802.

<sup>g</sup> For. Rel., 1889, 802.

<sup>h</sup> Id. 803.

<sup>i</sup> Id. 803, 805.

<sup>j</sup> Mr. Hay, Secretary of State, to Mr. Loomis, minister to Venezuela, telegram, November 8, 1899, For. Rel. 1899, 809.

November 20, 1899, the minister reported that he had on that day "entered into official relations with the *de facto* government of General Castro," who had assured him that he possessed the machinery of government throughout the Republic and had the support of the State governments. The entrance into relations had been delayed in order to see whether anything would come of the movement begun by General Hernandez, but he had "not once offered battle or shown any disposition to fight."<sup>a</sup> The act of recognition was approved.<sup>b</sup>

"Venezuela has once more undergone a revolution. The insurgents, under General Castro, after a sanguinary engagement in which they suffered much loss, rallied in the mountainous interior and advanced toward the capital. The bulk of the army having sided with the movement, President Andrade quitted Caracas, where General Castro set up a provisional government with which our minister and the representatives of other powers entered into diplomatic relations on the 20th of November, 1899."

President McKinley, Annual Message, Dec. 5, 1899.

#### 11. BOLIVIA; ECUADOR.

##### § 53.

Premising his instructions with the statement that the United States did "not hasten to recognize revolutionary governments," but waited "to see grounds for regarding them as permanently organized and firmly established," Mr. Seward approved the course of the minister of the United States "in declining to recognize, officially, the provisional government of Bolivia," which had "supplanted the administration of General Acha, through a revolution effected by General Melgarejo, by force of arms;" and directed him, if his course was objected to by the ruling authority in Bolivia, to ask for his passports, return within convenient reach, and report his proceedings."<sup>c</sup> Six months later the minister was instructed that, under the peculiar circumstances surrounding the questions pending between the South American republics on the Pacific and the Government of Spain, the President deemed it expedient "to recognize the actual government of Bolivia, if that government has become truly and in fact consolidated."<sup>d</sup> Soon afterwards positive instructions were given to recognize "the actual government now in power, namely, that of President Melgarejo," by the presentation of credentials.<sup>e</sup>

<sup>a</sup> For. Rel., 1899, 809-810, 811-812.

<sup>b</sup> Id. 812.

<sup>c</sup> Mr. Seward, Sec. of State, to Mr. Hall, Sept. 28, 1865, MS. Inst. Bolivia, I. 80. See, as to the revolution, Dip. Cor. 1866, II. 327 et seq.

<sup>d</sup> Mr. Seward, Sec. of State, to Mr. Hall, April 21, 1866, Dip. Cor. 1866, II. 330.

<sup>e</sup> Mr. Seward, Sec. of State, to Mr. Hall, July 10, 1866, Dip. Cor. 1866, II. 331.

“Early in the year the peace of Bolivia was disturbed by a successful insurrection. The United States minister remained at his post, attending to the American interests in that quarter, and using besides his good offices for the protection of the interests of British subjects in the absence of their national representative. On the establishment of the new government our minister was directed to enter into relations therewith.

“General Pando was elected President of Bolivia on October 23rd.”

President McKinley, Annual Message, Dec. 5, 1899. On receiving a report from the minister of the United States of the serious condition of affairs at La Paz, Bolivia, and in the surrounding country in February, 1899, the Department of State instructed him that he could have “no diplomatic relations with the insurgents, implying their recognition by the United States as the legitimate government of Bolivia, but that, short of such recognition,” he was “entitled to deal with them as the responsible parties in local possession,” to the extent of demanding for himself and for all Americans “within reach of the insurgent authority within the territory controlled by them the fullest protection for life and property.” Should the situation at La Paz become “unendurable or more perilous” he was to collect all Americans within reach and quit the city, taking them with him, and demanding adequate escort to the nearest place of safety. (Mr. Hay, Secretary of State, to Mr. Bridgman, minister to Bolivia, March 14, 1899, MS. Inst. to Bolivia, II, 113.) Subsequently a provisional junta of government was formed, and upon his representation that it was unopposed and orderly in its administration the American minister was instructed that if the provisional government was “de facto administered by the junta according to regular methods affording reasonable guarantees of stability and international responsibility and without organized resistance” he should notify the junta that he was “authorized by the President to enter into relations with the provisional government,” and advise the Department of State of his action in order that the President might make appropriate reply to the autograph letter addressed to him by the junta on April 26, 1899. (Mr. Adee, Acting Secretary of State, to Mr. Bridgman, August 22, 1899, MS. Inst. Bolivia, II, 126; For. Rel. 1899, 107.)

“As respects the question of recognizing the new revolutionary government of Bolivia, Mr. Bridgman had been instructed to enter into relations with it, when it shall appear to be established in control of the machinery of administration and in a position to fulfill its international obligations. At the date of the last dispatches from Mr. Bridgman, October 20, he was deferring action upon that instruction until the constitutional assembly shall have convened. By a telegram dated October 25, I have since learned that General Pando was on that day elected President of Bolivia, and I have little doubt that Mr. Bridgman will have soon carried out the instructions sent him in regard to the recognition of General Pando's government by the United States.” (Mr. Hay, Secretary of State, to Lord Pauncefoot, British ambassador, November 16, 1899, For. Rel. 1899, 344.

September 6, 1895, the Department of State, on receiving from the United States consul-general at Guayaquil information of the defeat of the Government forces in Ecuador by General Alfaro, instructed the American minister at Quito that “inter-

Ecuador.

course for the disposal of current matters affecting American interests with the de facto authority administering the public affairs of the State with the general acquiescence of its people and controlling the machinery of government to that end is in accordance with the traditional policy of this Government. In accordance with that policy, it is for you on the spot to determine with sound discretion the responsible authority to which you are to address yourself. Any professed formalities of recognition should await the instructions of your Government, which may be sought and obtained by cable, if necessary."

Mr. Adee, Acting Sec. of State, to Mr. Tillman, minister to Ecuador, Sept. 6, 1895, For. Rel. 1895, I. 246.

"The precedents by which the intercourse of the United States with foreign nations is governed have established the clear right, under the law of nations and treaties, to maintain, through its properly appointed agents, communication with the de facto authorities of a foreign state upon all matters affecting either this Government or its citizens, the only limit to this proviso being that our agents are bound to avoid interference in the domestic questions of the State. In the present instance no such interference appears likely, or even possible, as the government of General Alfaro is understood to be in full possession of the machinery of the State. The right and propriety, therefore, of your conducting all current relations with it in your capacity as minister to Ecuador can not be questioned.

"As to formal recognition, the practice of this Government has been to enter into effective relations with the de facto government when it shall have been fully established with the general consent of the people. I assume from the communication of Señor Carbo that such a government has been organized in Ecuador, although its style and title are not stated by him. It would seem to be a provisional government, controlled by a council of ministers, with General Alfaro as its president and supreme head of the State. On this understanding, and being satisfied that the new Government is in possession of the executive forces of the nation, and administering the same with due regard for the obligations of international law and treaties, you will enter into full relations with it."

Mr. Olney, Secretary of State, to Mr. Tillman, minister to Ecuador, November 6, 1895, For. Rel. 1895, I. 248, 249.

## 12. PERU.

### § 54.

January 31, 1880, it was formally announced that the President of the United States had "decided to recognize the government established in Peru by His Excellency Don Nicolas de Pierola and to receive the ceremonial letter of the latter, it

being understood \* \* \* that the people of Peru were driven to the acceptance of a new government, on a provisional basis, by the external pressure of their affairs, and that the accession of General Pierola to power was not accomplished by civil strife or factious insurrection."<sup>a</sup>

May 9, 1881, Mr. Blaine, replying to a dispatch of Mr. Christiancy, United States minister at Lima, in which it was stated that Chile refused to recognize General Piérola as representing the civil authority in Peru, and that Señor Calderon was at the head of a provisional government, said: "If the Calderon government is supported by the character and intelligence of Peru, and is really endeavoring to restore constitutional government with a view both to order within and negotiation with Chili for peace, you may recognize it as the existing provisional government, and render what aid you can by advice and good offices to that end. Mr. Elmore has been received by me as the confidential agent of such provisional government."<sup>b</sup> Mr. Christiancy, "seeing that the question whether the Calderon government was a government *de facto* was not expressly made a condition," recognized it on the 26th of June, although he did not then consider it a government *de facto*.<sup>c</sup> He thought the recognition "premature,"<sup>d</sup> and on October 4, 1881, Mr. Hurlbut, his successor, reported the practical suppression of the government by the Chilean forces.<sup>e</sup> October 31, 1881, Mr. Hurlbut was instructed to "continue to recognize Calderon government until otherwise specially instructed."<sup>f</sup> This instruction was in substance repeated, November 26, 1881, President Calderon having in the meantime been arrested, together with his minister for foreign affairs, by the Chilean military authorities.<sup>g</sup> He was afterwards transported to Chile as a prisoner, and Señor Montero, as vice-president, represented, first at one place and then at another, the authority of his government.

"It is now claimed that the government of Calderon-Montero has lost the attributes of a *de facto* government, and it is urged that, not having the support of the people, it is no longer entitled to recognition. The information furnished this Department on the subject, however, is most

<sup>a</sup> Mr. Evarts, Sec. of State, to Señor Don José Carlos Tracy, Jan. 31, 1880, MS. Notes to Peru, II. 31. The answer to the ceremonial letter of President Pierola was transmitted "through the usual channel of the United States diplomatic representative at Lima." (Ibid.; Mr. Evarts, Sec. of State, to Mr. Christiancy, Feb. 19, 1880, MS. Inst. Peru, XVI. 433.)

<sup>b</sup> For. Rel. 1881, p. 909.

<sup>c</sup> Mr. Christiancy to Mr. Blaine, June 28, 1881, For. Rel. 1881, 19.

<sup>d</sup> Dispatch of July 6, 1881, For. Rel. 1881, 920.

<sup>e</sup> Mr. Hurlbut to Mr. Blaine, Oct. 4, 1881, For. Rel. 1881, 935.

<sup>f</sup> Mr. Blaine, Sec. of State, to Mr. Hurlbut, telegram, Oct. 31, 1881, For. Rel. 1881, 945.

<sup>g</sup> For. Rel. 1881, 947, 953.

conflicting, and is naturally colored by the sentiments of the different observers. On the one hand, it is said that General Iglesias is supported by fully five-sixths of the population of Peru, that the provinces of the north and center are solidly united in his aid and in approval of his plan of settlement, while, on the other hand, we are told that Calderon was never so strong as at present, that his own moral influence and the physical force of his followers are impregnable in Arequipa, and that a majority of his countrymen support and approve his course. It is evident that no peace can be made unless Peru is represented in its negotiation by someone having the support of his fellow-countrymen and whose action will meet with their approval.

"In Señor Calderon this Government understood that it recognized such a ruler. As at present advised, it would not hastily withdraw or transfer that recognition. Should the facts be as alleged by the friends of General Iglesias, this Government will not, by adhering to the recognition of Señor Calderon, impede the advance toward an amicable adjustment of the difficulty."

Mr. Frelinghuysen, Sec. of State, to Mr. Phelps, U. S. minister to Peru, July 26, 1883, For. Rel. 1883, 709.

Iglesias Govern-  
ment.

"The contest between Bolivia, Chili, and Peru has passed from the stage of strategic hostilities to that of negotiation, in which the counsels of this Government have been exercised. The demands of Chili for absolute cession of territory have been maintained, and accepted by the party of General Iglesias to the extent of concluding a treaty of peace with the Government of Chili in general conformity with the terms of the protocol signed in May last between the Chilian commander and General Iglesias. As a result of the conclusion of this treaty, General Iglesias has been formally recognized by Chili as President of Peru, and his government installed at Lima, which has been evacuated by the Chilians. A call has been issued by General Iglesias for a representative assembly, to be elected on the 13th of January, and to meet at Lima on the 1st of March next. Meanwhile the provisional government of General Iglesias has applied for recognition to the principal powers of America and Europe. When the will of the Peruvian people shall be manifested, I shall not hesitate to recognize the government approved by them."

President Arthur, Third Annual Message, Dec. 4, 1883.

See Mr. Frelinghuysen, Sec. of State, to Mr. Logan, March 17, 1884, MS. Inst. Chile, XVII. 131.

The congress convoked by General Iglesias met and ratified the treaty and confirmed him in power, and the United States was on the



point of extending a formal recognition when his minister of foreign affairs in an interview with the diplomatic corps demanded of them an immediate recognition, and upon their refusal to accord it declared that relations with the legations must cease. The Government of the United States, regarding the question of recognition as one addressed to its "independent judgment and discretion,"<sup>a</sup> uninfluenced by "anything in the nature of a menace,"<sup>a</sup> authorized its minister to present his credentials to President Iglesias on a satisfactory retraction of the attitude of the minister of foreign affairs toward the legations.<sup>b</sup> The retraction was made, and recognition duly accorded.<sup>c</sup>

December 2, 1885, as the result of a revolution under General Caceres, President Iglesias was deposed, and the Government was committed to a council of ministers till a popular election should be held.<sup>d</sup>

"If for no other reason, a sound motive for avoiding hasty recognition in the present instance is found in the circumstance, reported by you, that the arrangement whereby Iglesias and Caceres renounced their claims to the executive power and delegated three commissioners on each side to devise a provisional government, was brought about through the good offices of the diplomatic body in Lima. It is presumed that you joined in this exercise of good offices, at least no intimation to the contrary has been received. If so, your purpose was laudable. Any friendly steps toward permitting the Peruvians to reestablish public order and good government are commendable. But the United States, holding steadfastly to the principles of constitutional self-government, can not assume to forejudge the popular will of Peru by ratifying and confirming an experimental and provisional order of things they may have indirectly helped to create.

"It will be your province to maintain the most friendly and intimate relations with whatever government may be fully established and in possession of the power of the nation. It is, however, for the President to determine when and how formal recognition of the new government of Peru by the United States shall be effected. Probably credentials will be sent to you in due time to be presented to the President of Peru when his authority shall have been confirmed by the Peruvian people. In point of fact, your intercourse with the government during the brief interregnum will be as full and direct as

<sup>a</sup> Mr. Frelinghuysen, Sec. of State, to Mr. Phelps, April 9, 1884, MS. Inst. Peru, XVII. 47.

<sup>b</sup> Mr. Frelinghuysen, Sec. of State, to Mr. Phelps, telegram, April 18, 1884, MS. Inst. Peru, XVII. 50.

<sup>c</sup> Mr. Phelps, minister to Peru, to Mr. Frelinghuysen, Sec. of State, April 29, 1884, For Rel. 1884, p. 420; Mr. Frelinghuysen, Sec. of State, to Mr. Gibbs, May 19, 1884, MS. Inst. Peru, XVII. 55.

<sup>d</sup> For Rel. 1885, 678.

though the formality of recognition had taken place, and you will scrupulously avoid any abstention which might appear to denote distrust or opposition on our part.”

Mr. Bayard, Sec. of State, to Mr. Buck, Dec. 16, 1885, MS. Inst. Peru, XVII. 192. See For. Rel. 1888, I, 993, 994, as to Haytian Revolution of 1888.

See, also, as to *de facto* and *de jure* governments, Mr. Bayard, Sec. of State, to Mr. Buck, Feb. 18, 1886, MS. Inst. Peru, XVII. 205.

“On the 16th ultimo Mr. Elmore [who had for some time been Peruvian minister at Washington] communicated to the Department, the letter of the five notables who had assumed control of the Peruvian administration, announcing themselves as a provisional government. It was arranged in conference with Mr. Elmore that the addresses to be made on presenting his letter of recall (28th ultimo) should have the effect of recognizing the provisional government as the temporary repository of Peruvian authority, it being understood that it is to be succeeded shortly by a President and Congress already elected by the people of Peru.

“The following telegram was sent you on the 27th (Tuesday): ‘President receives Peruvian minister Wednesday to present letter of recall; at the same time recognizes provisional government as about to be legitimately succeeded by President and Congress elect. You will announce this friendly action same day (twentieth-eighth).’”

Mr. Bayard, Sec. of State, to Mr. Buck, May 1, 1886, MS. Inst. Peru, XVII. 214.

### 13. BRAZIL.

#### § 55.

On November 17, 1889, Mr. Adams, United States minister to Brazil, telegraphed: “Imperial family sailed to-day. **The Republic.** Government *de facto*, with ministry, established. Perfect order maintained. Important we acknowledge Republic first.”<sup>a</sup> The events thus reported were the results of a sudden, unexpected, and bloodless revolution committed on the two preceding days by the military and naval forces at Rio de Janeiro, who arrested and deposed the ministry, proclaimed a republic, and, holding the Emperor a prisoner in the palace, ordered the imperial family to leave the country within twenty-four hours.<sup>b</sup> November 19 Mr. Adams was instructed to “maintain diplomatic relations with the provisional government of Brazil.”<sup>c</sup> The provisional government announced that it would respect all contracts and engagements entered into by the state, and confirmed the powers given by the Empire to the Brazilian represent-

<sup>a</sup> To Mr. Blaine, Sec. of State, For. Rel. 1889, 60.

<sup>b</sup> Mr. Adams to Mr. Blaine, telegram, Nov. 16, 1889, For. Rel. 1889, 59; same to same, Nov. 19, 1889, id. 60.

<sup>c</sup> Telegram of Mr. Blaine, Sec. of State, to Mr. Adams, For. Rel. 1889, 63.

atives in Washington, where the International American Conference and the International Maritime Conference were then in session.<sup>a</sup> November 25 Mr. Adams reported that the Argentine Republic, Chile, and Uruguay had recognized the new government.<sup>b</sup> November 30 he "was instructed that so soon as a majority of the people of Brazil should have signified their assent to the establishment and maintenance of the Republic he was to give it, on behalf of the United States, a formal and cordial recognition."<sup>c</sup>

"The recent revolution in Brazil in favor of the establishment of a republican form of government is an event of great interest to the United States. Our minister at Rio de Janeiro was at once instructed to maintain friendly diplomatic relations with the provisional government, and the Brazilian representatives at this capital were instructed by the provisional government to continue their functions. Our friendly intercourse with Brazil has, therefore, suffered no interruption.

"Our minister has been further instructed to extend on the part of this Government a formal and cordial recognition of the new Republic so soon as the majority of the people of Brazil shall have signified their assent to its establishment and maintenance."

President Harrison's Annual Message, Dec. 3, 1889.

"The minister of Brazil in this capital, Mr. Amaral Valente, and his associate the Brazilian minister on special mission, Mr. Mendonça, having recently received new letters of credence as representatives of the United States of Brazil, they were received in that capacity by the the President on Wednesday the 29th instant. \* \* \*

"The President, on the 30th instant, sent to the Senate the following new nomination in your case:

"Robert Adams, jr., of Pennsylvania, now accredited envoy extraordinary and minister plenipotentiary to the Empire of Brazil, to be envoy extraordinary and minister plenipotentiary to the United States of Brazil."

"Upon confirmation thereof by the Senate, a new commission and letter of credence will be sent to you. Upon delivery of the latter, in the usual way, the successive stages of diplomatic procedure in regard to the change of Government in Brazil and the reciprocal representation of the two countries will have been completed."

Mr. Blaine, Sec. of State, to Mr. Adams, Jan. 31, 1890, MS. Inst. Brazil, XVII. 433.

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<sup>a</sup> For. Rel. 1889, 60, 70, 71. See also Mr. Blaine to Mr. Adams, telegrams, Nov. 19 and Nov. 23, 1889, MS. Inst. Brazil, XVII. 422, 423.

<sup>b</sup> Telegram, For. Rel. 1889, 63. See also dispatch of Mr. Adams of Dec. 6, 1889, announcing recognition by Switzerland, France, and the Pope. The other European powers resumed diplomatic relations unofficially. (For. Rel. 1889, 66.)

<sup>c</sup> Telegram of Mr. Blaine, Sec. of State, For. Rel. 1889, 66.

"Dispatches en route will inform you of the full recognition of the United States of Brazil, both by the President and Congress. You have been nominated and confirmed as minister plenipotentiary to the new Republic."

Mr. Blaine, Sec. of State, to Mr. Adams, telegram, Feb. 20, 1890, MS. Inst. Brazil, XVII. 446.

Congress, by a joint resolution approved Feb. 19, 1890, congratulated the people of Brazil "on their just and peaceful assumption of the powers, duties, and responsibilities of self-government, based upon the free consent of the governed, and in their recent adoption of a republican form of government." (For. Rel. 1890, 21.)

This resolution was communicated to the Brazilian Government through the legation of the United States at Rio de Janeiro. (For. Rel. 1890, 22.)

For the response of the Brazilian congress, Jan. 21, 1899, see For. Rel. 1891, 50-51.

"Toward the end of the past year the only independent monarchical government on the Western Continent, that of Brazil, ceased to exist and was succeeded by a Republic. Diplomatic relations were at once established with the new Government, but it was not completely recognized until an opportunity had been afforded to ascertain that it had popular approval and support. When the course of events had yielded assurance of this fact, no time was lost in extending to the new Government a full and cordial welcome into the family of American Commonwealths. It is confidently believed that the good relations of the two countries will be preserved, and that the future will witness an increased intimacy of intercourse and an expansion of their mutual commerce."

President Harrison, Annual Message, Dec. 1, 1890.

#### 14. CHILE.

##### § 56.

On the overthrow of the Balmaceda Government in Chile by the Congressionalists in 1891, the minister of the United States at Santiago was instructed to recognize the new Government if it was accepted by the people.<sup>a</sup>

#### 15. HAWAII.

##### § 57.

After the deposition of the monarchy in Hawaii in January, 1893, representatives of the provisional government were received at Washington, where a treaty was concluded with them on the 14th of February for the annexation of the islands to the United States.<sup>b</sup> This treaty was withdrawn from

<sup>a</sup> See For. Rel. 1891, 159.

<sup>b</sup> For. Rel. 1894, App. II. 197-205.

the Senate by the succeeding Administration, but official relations with the provisional government were continued.<sup>a</sup> In August, 1894, the constitutional government of the Republic of Hawaii was formally recognized.<sup>b</sup>

16. SANTO DOMINGO.

§ 58.

“The neighboring island Republic of Santo Domingo has lately been the scene of revolution, following a long period of tranquillity. It began with the killing of President Heureaux in July last, and culminated in the relinquishment by the succeeding vice-president of the reins of government to the insurgents. The first act of the provisional government was the calling of a presidential and constituent election. Juan Isidro Jimenez, having been elected President, was inaugurated on the 14th of November. Relations have been entered into with the newly established Government.”

President McKinley, Annual Message, Dec. 5, 1899.

October 19, 1899, Mr. Adee, Second Assistant Secretary, acknowledging the receipt of a dispatch from Mr. Maxwell, U. S. consul-general at San Domingo City, with reference to an official notification which the latter had received of the formation of the provisional government, said:

“The Department has properly instructed Mr. Powell in the matter with a view to his entering into full relations with the provisional government upon his return to his post. In the meantime, and so long as the *de facto* character of the government shall appear to be duly established and its power to administer public affairs and fulfill international obligations shall be evident, you will continue to maintain intercourse with it, so far as may be necessary for the transaction of consular business, explaining, however, to Senor Ferreras that you will do so provisionally and subject to the formal action to be taken in due time by the United States diplomatic representative.” (169 MS. Inst. to Consuls, 506.)

For the formal recognition of the elective government of President Jimenez, January 17, 1900, see For. Rel., 1900, 425. See also President McKinley's annual message, December 3, 1900.

September 1, 1899, shortly after the assassination of President Heureaux, Mr. Hay, as Secretary of State, telegraphed to the minister of the United States: “Report when effective and responsible *de facto* government is organized in Santo Domingo, but take no steps toward recognition without explicit instructions.” (For. Rel. 1899, 248.) October 19, 1899, Mr. Hay wrote: “Upon your being satisfied that the new government of Santo Domingo is in possession of the executive forces of the nation and administering the public affairs with due regard for the obligations of international law and treaties, you will enter into full relations with it. This is

<sup>a</sup> For. Rel. 1894, App. II. 421, 431. Also, S. Doc. 40, 54 Cong. 2 sess. 5.

Jan. 20, 1880, the consul of the United States at Apia was instructed to recognize Malietoa as King of Samoa. (MS. Inst. to Consuls, XCIV. 643; S. Doc. 40, 54 Cong. 2 sess. 14.)

<sup>b</sup> For. Rel. 1894, 358-360. See, also, President Cleveland's Annual Message, Dec. 3, 1894.

done by your addressing a note to the Dominican minister of foreign relations." (Mr. Hay, Secretary of State, to Mr. Powell, minister to Santo Domingo, October 19, 1899, For. Rel. 1899, 248, 249.) Subsequently Mr. Powell was directed to carry out this instruction by entering into relations with the government established under President Jimenez. (Mr. Hay, Secretary of State, to Mr. Powell, minister to Santo Domingo, January 5, 1900, For. Rel. 1899, 253.) President Jimenez was publicly inaugurated November 15, 1899, and duly appointed a cabinet. (For. Rel. 1899, 251.)

"This Government has never recognized Cabral as even entitled to the rights of a belligerent. Certainly, therefore, it can not acknowledge any claim of his to rule any part of the territory of the Dominican Republic. It is perhaps superfluous to add that this Government has no connection, direct or indirect, with the association which has bought or leased from Baez certain territory around the Bay of Samana. The enterprise adverted to has no other claims upon us than other similar enterprises of citizens of the United States in foreign countries, which must be undertaken at their own risk and subject to the laws of such countries." (Mr. Fish, Sec. of State, to Mr. Bassett, Mar. 26, 1873, MS. Inst. Hayti, I. 287.)

#### IV. RECOGNITION OF BELLIGERENCY.

##### 1. CONDITIONS AND EFFECTS OF RECOGNITION.

#### § 59.

It is only in recent times, with the development of the system of neutrality, that the subject of the recognition of belligerency has acquired scientific precision and consistency. Where the armed conflict is between independent nations, no embarrassment arises, since the parties, whenever the existence of a state of war is duly established, immediately become entitled to the rights of belligerents. But in the case of insurrection or revolt the question is less simple. It is said to have been "the constant practice of European nations, and of the United States, to 'look upon belligerency as a fact rather than a principle,' holding with Mr. Canning that 'a certain degree of force and consistency acquired by a mass of population engaged in war entitled that population to be treated as belligerent.'"<sup>a</sup> The determination, however, of the question whether such a condition has been attained involves various considerations, which will be presented below.

The mere recognition of the existence of a condition of hostilities, or war *de facto*, does not imply the recognition of a legal state of war, the parties to which are to be treated as belligerents.<sup>b</sup> "A war *de facto* then [1804] unquestionably existed between France and St. Domingo;"<sup>c</sup> and yet the United States not only refused to recognize the insurgents as belligerents, but also forbade intercourse with them.<sup>d</sup>

<sup>a</sup> Abdy's Kent (1878), 94, citing Hansard, CLXII. 1566.

<sup>b</sup> The Three Friends, 166 U. S. 1.

<sup>c</sup> Marshall, C. J., *Rose v. Himley* (1808), 4 Cranch, 239, 272.

<sup>d</sup> Moore, Int. Arbitrations, V. 4476-4477.

“Belligerency is recognized when a political struggle has attained a certain magnitude and affects the interests of the recognizing power; and in the instance of maritime operations recognition may be compelled, or the vessels of the insurgents, if molesting third parties, may be pursued as pirates.”

The Three Friends (1897), 166 U. S. 1, 63.

“The recognition of belligerency involves the rights of blockade, visitation, search and seizure of contraband articles on the high seas, and abandonment of claims for reparation on account of damages suffered by our citizens from the prevalence of warfare.”

The Three Friends (1897), 166 U. S. 1, 63.

Recognition of belligerency “does not confer upon the community recognized all the rights of an independent state, but it grants to its government and subjects the rights and imposes upon them the obligations of an independent state in all matters relating to the war.”

Lawrence, Principles of International Law, § 162.

Whether a sovereign, who is endeavoring to reduce his revolted subjects to obedience, assumes to exercise in a particular instance the rights of sovereignty or the rights of belligerency must be determined by “the character of the act. If as a legislator he publishes a law ordaining punishments for certain offences, which law is to be applied by the courts, the nature of the law, and of the proceedings under it, will decide whether it is an exercise of belligerent rights or exclusively of his sovereign power.”

Marshall, C. J., *Rose v. Himely* (1808), 4 Cranch, 239, 272.

“The occasion for the accordance of belligerent rights arises when a civil conflict exists within a foreign state. The reason which requires and can alone justify this step by the government of another country is that its own rights and interests are so far affected as to require a definition of its own relations to the parties. Where a parent government is seeking to subdue an insurrection by municipal force, and the insurgents claim a political nationality and belligerent rights which the parent government does not concede, a recognition by a foreign state of full belligerent rights, if not justified by necessity, is a gratuitous demonstration of moral support to the rebellion and of censure upon the parent government. But the situation of a foreign state with reference to the contest, and the condition of affairs between the contending parties, may be such as to justify this act. It is important, therefore, to determine what state of affairs, and what relations of the foreign state, justify the recognition.

"It is certain that the state of things between the parent state and insurgents must amount, in fact, to a *war*, in the sense of international law—that is, powers and rights of war must be in actual exercise; otherwise the recognition is falsified, for the recognition is of a fact. The tests to determine the question are various, and far more decisive where there is maritime war and commercial relations with foreigners. Among the tests are the existence of a *de facto* political organization of the insurgents sufficient in character, population, and resources to constitute it, if left to itself, a state among the nations, reasonably capable of discharging the duties of a state; the actual employment of military forces on each side, acting in accordance with the rules and customs of war, such as the use of flags of truce, cartels, exchange of prisoners, and the treatment of captured insurgents by the parent state as prisoners of war; and, at sea, employment by the insurgents of commissioned cruisers, and the exercise by the parent government of the rights of blockade of insurgent ports against neutral commerce, and of stopping and searching neutral vessels at sea. If all these elements exist, the condition of things is undoubtedly war; and it may be war before they are all ripened into activity.

"As to the relation of the foreign state to the contest, if it is solely on land, and the foreign state is not contiguous, it is difficult to imagine a call for the recognition. If, for instance, the United States should formally recognize belligerent rights in an insurgent community at the center of Europe, with no seaports, it would require a hardly supposable necessity to make it else than a mere demonstration of moral support. But a case may arise where a foreign state must decide whether to hold the parent state responsible for acts done by the insurgents, or to deal with the insurgents as a *de facto* government. (Mr. Canning to Lord Granville on the Greek war, June 22, 1826.) If the foreign state recognizes belligerency in the insurgents, it releases the parent state from responsibility for whatever may be done by the insurgents, or not done by the parent state where the insurgent power extends. (Mr. Adams to Mr. Seward, June 11, 1861, Dip. Corr., 105.) In a contest wholly upon land a contiguous state may be obliged to make the decision whether or not to regard it as a war; but, in practice, this has not been done by a general and prospective declaration, but by actual treatment of cases as they arise. Where the insurgents and the parent state are maritime, and the foreign nation has extensive commercial relations and trade at the ports of both, and the foreign nation and either or both of the contending parties have considerable naval force, and the domestic contest must extend itself over the sea, then the relations of the foreign state to this contest are far different.

"In such a state of things the liability to political complications, and the questions of right and duty to be decided at once, usually away from home, by private citizens or naval officers, seem to require an authoritative and general decision as to the status of the three parties



involved. If the contest is a war, all foreign citizens and officers, whether executive or judicial, are to follow one line of conduct; if it is not a war, they are to follow a totally different line. If it is a war the commissioned cruisers of both sides may stop, search, and capture the foreign merchant vessel, and that vessel must make no resistance and must submit to adjudication by a prize court; if it is not a war, the cruisers of neither party can stop or search the foreign merchant vessel; and that vessel may resist all attempts in that direction, and the ships-of-war of the foreign state may attack and capture any cruiser persisting in the attempt. If it is war, foreign nations must await the adjudication of prize tribunals; if it is not war, no such tribunal can be opened. If it is war, the parent state may institute a blockade *jure gentium* of the insurgent ports, which foreigners must respect; but if it is not a war, foreign nations having large commercial intercourse with the country will not respect a closing of insurgent ports by paper decrees only. If it is a war, the insurgent cruisers are to be treated by foreign citizens and officials, at sea and in port, as lawful belligerents; if it is not a war, those cruisers are pirates, and may be treated as such. If it is a war, the rules and risks respecting carrying contraband, or dispatches, or military persons, come into play; if it is not war, they do not. Within foreign jurisdiction, if it is a war, acts of the insurgents in the way of preparation and equipments for hostility may be breaches of neutrality laws; while, if it is not war, they do not come into that category, but under the category of piracy or of crimes by municipal law. \* \* \* If it [the political department of a foreign government] issues a formal declaration of belligerent rights prematurely, or in a contest with which it has no complexity, it is a gratuitous and unfriendly act. If the parent government complains of it, the complaint must be made upon one of these grounds. To decide whether the recognition was uncalled for and premature requires something more than a consideration of proximate facts and the overt and formal acts of the contending parties. The foreign state is bound and entitled to consider the preceding history of the parties; the magnitude and completeness of the political and military organizations and preparations on each side; the probable extent of the conflict by sea and land; the probable extent and rapidity of its development; and, above all, the probability that its own merchant vessels, naval officers, and consuls may be precipitated into sudden and difficult complications abroad. The best that can be said is that the foreign state may protect itself by a seasonable decision—either upon a test case that arises or by a general prospective decision—while, on the other hand, if it makes the recognition prematurely, it is liable to the suspicion of an unfriendly purpose to the parent state. The recognition of belligerent rights is not solely to the advantage of the insurgents. They gain the great advantage of a recognized status, and the opportunity to employ commissioned cruisers at sea, and to exert all the powers known to maritime

warfare, with the sanction of foreign nations. They can obtain abroad loans, military and naval materials, and enlist men, as against everything but neutrality laws; their flag and commissions are acknowledged, their revenue laws are respected, and they acquire a quasi-political recognition. On the other hand, the parent government is relieved from responsibility for acts done in the insurgent territory; its blockade of its own ports is respected; and it acquires a right to exert against neutral commerce all the powers of a party to a maritime war."

Note of Mr. Dana, Dana's Wheaton, § 23, p. 34.

Sir Alexander Cockburn, in his opinion at Geneva, says: "The principles by which a neutral state should be governed as to the circumstances under which, or the period at which, to acknowledge the belligerent status of insurgents have been nowhere more fully and ably, or more fairly, stated than by Mr. Dana, in his edition of Wheaton, in a note to section 23."

See Lawrence, Principles of Int. Law, § 163.

## 2. THE AMERICAN REVOLUTION.

### § 60.

Turning to the precedents, we find, as has been intimated, little of definite value in the earlier cases. "In the year 1779," said Mr. Wheaton, with reference to the American Revolution, "the United States constituted a confederation of States, sovereign *de facto*, and engaged in war with Great Britain, in which the rights of war were acknowledged by the parent country itself, in the solemn exchange of prisoners by regular cartels; in the respect shown to conventions of capitulation concluded by British generals, and in the exercise of other *commercium belli* usually practised and recognized between civilized nations."<sup>a</sup> But, both before and after 1779, the course of foreign governments toward the United States was varying and uncertain. The Com-

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<sup>a</sup> Mr. Wheaton, minister to Prussia, to Mr. Upshur, Sec. of State, No. 233, Aug. 23, 1843, H. Ex. Doc. 264, 28 Cong. 1 sess. 6. Immediately following the passage above quoted, Mr. Wheaton says: "The United States were associated, in the war against Great Britain, with two of the greatest powers of Europe—France and Spain—both of which had acknowledged their independence, whilst the former had concluded with them a treaty of intimate alliance." These statements are not altogether accurate. Spain did not acknowledge the independence of the United States pending hostilities. As late as March 30, 1782, Montmorin, the French ambassador at Madrid, wrote that the Count de Florida Blanca regarded the independence of the United States with "much indifference and perhaps fear;" that he had "never wished to declare himself openly for the United States, and even now he seems to draw himself away from them still more." (Dip. Cor. Am. Rev., Wharton, V. 287-289.) It may also be misleading to couple France and Spain as powers with which the United States was "associated" in the war against Great Britain. While Spain, at the solicitation of France, gave the United States in an early stage of the American conflict some pecuniary aid, she afterwards declined to give further assistance or to form any connection with the United States; and when, in June, 1779, she proceeded to engage in hostilities against Great Britain, she did so for purposes of her own, and without any concert or connection with the United States.

mittee of Secret Correspondence of the Continental Congress, writing to Deane, October 1, 1776, in the second year of the American Revolution, said: "We are told that our vigilant enemies have demanded of the courts of France, Spain, and Portugal to deliver up the American ships in their ports and to forbid their having any future intercourse with them. The court of Portugal has complied so far as to order our ships away on ten days' notice. That France and Spain gave evasive answers."<sup>a</sup> The extension of even more than ordinary belligerent privileges to American ships in French ports was "winked at" by the government,<sup>b</sup> but the fact that the French government was at the time rendering secret aid to the United States, of which it became early in 1778 the formal ally, detracts from the value of its action as a legal precedent. The same thing may be said as to the shifting course of Spain, who joined France in June, 1779, against Great Britain.<sup>c</sup> Portugal, August 30, 1780, ordered the exclusion of the privateers and prizes of all the nations at war from her ports;<sup>d</sup> but, by an edict published July 5, 1776, the same government had ordered the exclusion from its ports of all ships belonging to the people of the United States or coming from the ports of those States, and this edict was not repealed till February 15, 1783.<sup>e</sup> The government of Prussia ordered merely that "the merchant vessels of America" should be received on a footing of friendship and equality in the ports of the kingdom.<sup>f</sup> Denmark, in the autumn of 1779, seized and delivered up, on the demand of Great Britain, certain British ships which were brought by their American captors into the port of Bergen; but the Danish government afterwards intimated that it acted under compulsion.<sup>g</sup> In the autumn of 1779, Paul Jones put into the Texel in distress with two British ships, which he had captured at sea. The British ambassador demanded their seizure and restitution and the release of their crews. The States General, adhering to their "ancient maxim" not to decide "upon the legality or illegality of prizes brought into their ports," refused this demand, and ordered the captor, who is referred to as "a certain Paul Jones," as soon as practicable to put to sea.<sup>h</sup> In December, 1780, Great Britain, on various grounds, proclaimed reprisals against the Dutch, and a state of war between the two countries soon followed.<sup>i</sup>

<sup>a</sup> Dip. Cor. Am. Rev., Wharton, II. 157, 161. See, also, letter of Franklin, Deane, and Lee to the Portuguese ambassador at Paris, April 26, 1777, *id.* 307.

<sup>b</sup> Franklin and Deane to the Committee of Foreign Affairs, May 25, 1777, Dip. Cor. Am. Rev., Wharton, II. 322.

<sup>c</sup> Dip. Cor. Am. Rev., Wharton, III. 310.

<sup>d</sup> Wharton, Dip. Cor. Am. Rev. IV. 83.

<sup>e</sup> Wharton, Dip. Cor. Am. Rev. V. 586; VI. 294.

<sup>f</sup> Wharton, Dip. Cor. Am. Rev. III. 347-348.

<sup>g</sup> Wharton, Dip. Cor. Am. Rev. III. 385, 433, 435, 528, 534, 540, 597, 678, 679, 744; V. 462; VI. 717; Moore, *Int. Arbitrations*, V. 4572.

<sup>h</sup> Wharton, Dip. Cor. Am. Rev. III. 420-421.

<sup>i</sup> Wharton, Dip. Cor. Am. Rev. IV. 219, 510.

## 3. REVOLUTION IN SPANISH AMERICA.

## § 61.

“Your letter of the 29 May has been submitted to the consideration of the President. It does not appear that such general instructions as you mention have issued from this department, relative to the entry of vessels belonging to the Provinces of Spain; but it is the President’s desire that the intercourse with those provinces which are in a state of revolt should strictly conform to the duties of the government under the law of nations, the act of Congress and the treaties with foreign powers.

“1. There is no principle of the law of nations, which requires us to exclude from our ports the subjects of a foreign power, in a state of insurrection against their own government. It is not incumbent upon us to take notice of crimes & offences, which are committed against the municipal laws of another country, whether they are classed in the highest grade of Treason, or in the lowest grade of misdemeanor—Piracy is an offence against the law of nations & every civilized government undertakes to punish the pirate when brought within its jurisdiction, but an act of revolt or rebellion against a Sovereign must not be confounded with an act of Piracy, which is denominated hostility against the human race.

“Any Merchant Vessel therefore which has not committed an offence against the law of nations, being freighted with a lawful cargo & conforming in all respects to the laws of the United States, is entitled to an entry at our Custom houses whatever Flag she may bear—She is also entitled to take on board a return Cargo & to depart from the United States with the usual clearance.

“2. But while a public war exists between two foreign nations, or when a civil war exists in any particular nation, the provisions of the act of the 5 of June 1794 (3 vol. 88) must be strictly enforced. Under the cover of commercial intercourse, no enlistment must be permitted, except of the transient citizens or subjects of a foreign nation enlisting on board of the vessels belonging to their own country in the manner authorized by law—No vessels must be fitted for war, the force of armed vessels must not be augmented & military enterprises must not be set on foot within the territory & jurisdiction of the United States, with the intent to commit hostilities against any Prince or State with whom the United States are at peace—These prohibitions however do not affect the right of the American citizens to sell in a course of fair trade, any articles of American product or manufacture, nor the right of foreign merchant vessels to purchase and carry any such articles.

“3. There are two treaties in which the subjects of Spain are interested. First, the treaty of 1795, between the United States & Spain, and

second the treaty of 1803 (commonly called the Louisiana Convention) between the United States & France—As Spain has not herself recognized the independence of any of her colonies, The United States still considers all her subjects to be entitled to the benefit of the first treaty. . . . The second treaty is in the nature of a compact with France & all who were entitled to its benefits at the time of making it continue to be entitled to them.

“The subjects of Spain trading directly from Spain or from her colonies (whose independence, I repeat, has not been recognized) are therefore entitled as well as the subjects of France, to the benefit of the 7th Article of the Treaty for the limited period of twelve years, without regard to the commotions either in Spain or in the Colonies.

“The President desires that you will regulate your official conduct upon the principles that have been stated but if any extraordinary case occurs, you will report it to this Department with all possible dispatch.”

“P. S. Until otherwise instructed, sea letters are not to be granted to any vessels, but those which are bound beyond the Cape of Good Hope.”

Mr. A. J. Dallas, Sec. of the Treasury, to Mr. Duplessis, collector at New Orleans, July 3, 1815, MSS. Treasury Department.

September 1, 1815, President Madison issued, under the neutrality laws, a proclamation against the setting on foot in the United States of military expeditions or enterprises against the dominions of Spain.

President's Procla-  
mation, Septem-  
ber 1, 1815.

Am. State Papers, For. Rel., IV. 1.

“This insurrection [in South America] began slowly and partially at Buenos Ayres on the 14th of May, 1810, by the formation of a junta and the deposition of the viceroy, the government, however, being carried on in the name of the King of Spain until January, 1813, when a provisional government was established. On the 9th of July, 1816, the provinces of the Rio de la Plata issued a declaration of independence, and on the 20th of April, 1819, a constitution was published by the congress.

“In 1811 the insurrection commenced in Paraguay, the Spanish governor was deposed, and a government established under the direction of Dr. Francia. On the 12th of October, 1813, a constitution was proclaimed.

“In 1811 civil war commenced in Chili, but the declaration of independence was not issued until the 12th of February, 1818, and the war continued till 1820.

“The revolution in Peru commenced in 1821, a declaration of independence being issued on the 15th of July, 1821, and the war continuing until 1824.

“On the 15th of September, 1821, Guatemala declared her independence, which, however, was not finally established until the 1st of July, 1823.

“The revolution in Colombia (including Venezuela, Ecuador, and New Granada) commenced April 19, 1810, at Caracas. On the 5th of July, 1811, the congress declared Colombia an independent State, but the war with Spain continued until November, 1823.

"In 1815 the President of the United States allowed belligerent rights to the South American States and proclaimed a strict neutrality. This proclamation was recognized by the Supreme Court and other tribunals of the United States as the guide for their decisions." (Lord Russell to Mr. Adams, Aug. 30, 1865, Dip. Cor. 1865, I. 536, 540.)

"The respective dates which your lordship has been kind enough to search out and record in your note sufficiently establish the fact how carefully all precipitation was avoided [by the United States] in judging of the issue [between Spain and her colonies in America] in regard to the mother country." (Mr. Adams to Lord Russell, Sept. 18, 1865, Dip. Cor. 1865, I. 554, 557.)

"In reply to your third demand—the exclusion of the flag of the revolting provinces—I have to observe that, in consequence of the unsettled state of many countries, and repeated changes of the ruling authority in each, there being at the same time several competitors, and each party bearing its appropriate flag, the President thought it proper, some time past, to give orders to the collectors not to make the flag of any vessel a criterion or condition of its admission into the ports of the United States. Having taken no part in the differences and convulsions which have disturbed those countries, it is consistent with the just principles, as it is with the interests, of the United States to receive the vessels of all countries into their ports, to whatever party belonging, and under whatever flag sailing, pirates excepted, requiring of them only the payment of the duties, and obedience to the laws while under their jurisdiction, without adverting to the question whether they had committed any violation of the allegiance or laws obligatory on them in the countries to which they belonged, either in assuming such flag, or in any other respect."

Mr. Monroe, Sec. of State, to the Chev. de Onis, Spanish minister, Jan. 19, 1816, Am. State Papers, For. Rel., IV. 424, 426.

"It is found that existing laws have not the efficacy necessary to prevent violations of the obligations of the United States as a nation at peace toward belligerent parties and other unlawful acts on the high seas by armed vessels equipped within the waters of the United States."

"With a view to maintain more effectually the respect due to the laws, to the character, and to the neutral and pacific relations of the United States, I recommend to the consideration of Congress the expediency of such further legislative provisions as may be requisite."

President Madison, special message, Dec. 26, 1816.

"It has been represented—

"1. That vessels belonging to citizens of the United States, or foreigners, have been armed and equipped in our ports, and have cleared out from our custom-houses, as merchant vessels; and, after touching at other ports, have hoisted the flag of some of the belligerents, and cruised under it against the commerce of nations in amity with the United States.

Mr. Monroe's Letter,  
January 10, 1817.

"2. That, in other instances, other vessels, armed and equipped in our ports, have hoisted such flags after clearing out and getting to sea. \* \* \*

"3. That, in other instances, foreign vessels \* \* \* have taken on board citizens of the United States, as passengers, who, on their arrival at neutral ports, have assumed the character of officers and soldiers in the service of some of the parties in the contest now prevailing in our southern hemisphere."

Mr. Monroe, Sec. of State, to Mr. Forsyth, chm. Foreign Relations Committee, Jan. 10, 1817, Am. St. Pap. For. Rel. IV. 104.

"It was anticipated at an early stage that the contest between Spain and the colonies would become highly interesting to the United States. \* \* \* Through every stage of the conflict the United States has maintained an impartial neutrality, giving aid to neither of the parties in men, money, ships, or munitions of war. They have regarded the contest not in the light of an ordinary insurrection or rebellion, but as a civil war between parties nearly equal, having as to neutral powers equal rights. Our ports have been open to both." \* \* \*

President Monroe's  
Message, Decem-  
ber 2, 1817.

President Monroe, first annual message, Dec. 2, 1817.

In his annual message, Dec. 7, 1819, President Monroe said: "In the civil war existing between Spain and the Spanish provinces in this hemisphere the greatest care has been taken to enforce the laws intended to preserve an impartial neutrality. Our ports have continued to be equally open to both parties and on the same conditions, and our citizens have been equally restrained from interfering in favor of either to the prejudice of the other."

"In suppressing the establishment at Amelia Island no unfriendliness was manifested towards Spain, because the post was taken from a force which had wrested it from her. The measure, it is true, was not adopted in concert with the Spanish Government, \* \* \* because \* \* \* it was thought proper, in doing justice to the United States, to maintain a strict impartiality towards both belligerent parties, without consulting or acting in concert with either. It gives me pleasure to state that the Governments of Buenos Ayres and Venezuela, whose names were assumed, have explicitly disclaimed all participation in those measures, and even the knowledge of them. \* \* \*

Message on Amelia  
Island, Nov. 17,  
1818.

"The civil war which has so long prevailed between Spain and the provinces in South America still continues, without any prospect of its speedy termination."

President Monroe, message of Nov. 17, 1818.

The foregoing extract, with other passages from the same message, is quoted by Wheaton in the 4th volume of his reports, Appendix 23, under the head of "different public acts by which the Government of the United States has recognized the existence of a civil war between Spain and her American colonies." The learned reporter seems to have overlooked the message of Dec. 2, 1817, which is stronger and more explicit in its terms.

“When a civil war rages in a foreign nation, one part of which separates itself from the old-established government and erects itself into a distinct government, the courts of the Union must view such newly constituted government as it is viewed by the legislative and executive departments of the Government of the United States. If the Government of the Union remains neutral, but recognizes the existence of a civil war, the courts of the Union can not consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy.”

United States v. Palmer (1818), 3 Wheaton, 610, 643.

Cited by Wirt, Attorney-General, Nov. 6, 1818, 1 Op. 249.

See, also, *Rose v. Himely*, 4 Cranch, 242; *Gelston v. Hoyt*, 3 Wheat. 247.

Mr. Adams, Sec. of State, in a letter to Mr. Justice Johnson, Sept. 5, 1820, referring to the action of some of the South American governments in issuing privateering commissions to foreigners, and in condoning the irregularities of their tribunals in prize cases, observed that “the liberality of this Government in admitting to our ports armed vessels of the South American revolutionists” had “not been well requited.” (MS. Dom. Let. XVIII. 132.)

“The decision at the last term, in the case of the *United States v. Palmer*, establishes the principle that the Government of the United States, having recognized the existence of a civil war between Spain and her colonies, but remaining neutral, the courts of the Union are bound to consider as lawful those acts which war authorizes, and which the new governments in South America may direct against their enemy. Unless the neutral rights of the United States, as ascertained by the law of nations, the acts of Congress, and treaties with foreign powers, are violated by the cruisers sailing under commissions from those governments, captures made by them are to be regarded by us as other captures, *jure belli*, are regarded.”

The *Divina Pastora* (1819), 4 Wheat. 52, 63.

See *Nueva Anna*, 6 Wheat. 193; *La Santissima Trinidad*, 7 Wheat. 337.

Also, *Luther v. Borden*, 7 How. 1.

“As soon as the [revolutionary] movement assumed such a steady and consistent form as to make the success of the provinces probable, the rights to which they were entitled by the law of nations, as equal parties to a civil war, were extended to them. Each party was permitted to enter our ports with its public and private ships, and to take from them every article which was the subject of commerce with other nations. Our citizens also have carried on commerce with both parties, and the Government has protected it with each in articles not contraband of war. Through the whole of this contest the United

President Monroe's  
Message, March  
8, 1822.



States have remained neutral, and have fulfilled with the utmost impartiality all the obligations incident to that character."

President Monroe, special message, March 8, 1822, recommending the adoption of measures with a view to the recognition of the independence of the Spanish provinces in America. (Am. State Papers, For. Rel. IV. 818.)

President Woolsey criticises the first sentence in this passage, as follows: "This rule breaks down in several places. The probability is a creature of the mind, something merely subjective, and ought not to enter into a definition of what a nation ought to do. Again, the success does not depend on steadiness and consistency of form only, but on relative strength of the parties. If you make probability of success the criterion of right in the case, you have to weigh other circumstances before being able to judge which is most probable, success or defeat. Would you, if you conceded belligerent rights, withdraw the concession whenever success ceased to be probable? And, still further, such provinces in revolt are not entitled by the law of nations to *rights* as equal parties to a civil war. They have properly no rights, and the concession of belligerency is not made on their account, but on account of considerations of policy on the part of the state itself which declares them such, or on grounds of humanity." (Int. Law, App. III., note 19.)

In the case of the *Three Friends* (166 U. S. 63), government counsel specially examined the course of the United States with reference to the recognition of the belligerency of Latin-American insurgents during the first quarter of the nineteenth century. In the brief for the government the various contesting bodies in 1817 were classified as (1) the "leading Spanish-American colonies, whose position as belligerents was in doubt;" (2) "certain Spanish or Portuguese districts whose belligerency had not then been and never was recognized;" (3) Hayti; (4) Amelia Island and Galveston. The administration of President Madison came to an end March 4, 1817; and whether the belligerency of the South American revolutionists was recognized by that Administration depended, said government counsel, on the formalities essential to such recognition. Judge Benedict had taken the ground that a public proclamation by the Executive, or some public act by necessary implication equivalent to such a proclamation, was essential. (The *Conserva*, 38 Fed. Rep. 431, 437.) Mr. Clay had impliedly maintained the same view. (Annals of Congress, March 18, 1818, p. 1415.) President Monroe, in his message of Dec. 2, 1817, took the contrary view. As "Spanish or Portuguese districts," whose belligerency was not recognized, were specified Paraguay (Am. State Papers, For. Rel. IV. 219, 222, 225, 250, 265, 278, 339) and the Oriental Republic of Artigas. (Am. State Papers, For. Rel. IV. 173-4, 218, 219, 221, 225, 250, 268, 274, 288, 289; H. Ex. Doc. 53, 32 Cong. 1 sess. 193-200; The *Gran Para*, 7 Wheat. 471, 509; Wirt, At.-Gen., 1 Op. 249.) Nor was the belligerency of the Haytian chieftains recognized. (Wirt, At.-Gen., 1 Op. 249; Annals of Congress, March 18, 1818, p. 1245.) The partisans or freebooters at Amelia Island and Galveston were treated as pirates, though their principal leader, Aury, claimed the right to fly the Venezuelan, Artigan, and other revolutionary flags. (Wharton, Int. Law Dig. § 50 a.) "The states," said government counsel, "whose belligerency was recognized by Monroe in 1817 were doubtless those whose independence was recognized in 1822, namely, New Granada and Venezuela \* \* \* , Buenos Ayres, \* \* \* and Chili—the successful revolts of Peru and Mexico having been later than 1817. That the recognition of belligerency did not apply to all the minor insurgencies has been expressly ruled by this court in *The Nueva Anna and Liebre*, 6 Wheat. 193."

## 4. REVOLUTION IN TEXAS.

## § 62.

“It has never been held necessary, as a preliminary to the extension of the rights of hospitality to either [of the parties to a civil contest], that the chances of the war should be balanced and the probability of eventual success determined. For this purpose it has been deemed sufficient that the party had declared its independence and at the time was actually maintaining it. Such having been the course hitherto pursued by this Government, however important it might be to consider the probability of success, if a question should arise as to the *recognition of the independence of Texas*, it is not to be expected that it should be made a prerequisite to the mere exercise of hospitality implied by the admission of the vessels of that country into our ports. The declaration of neutrality by the President in regard to the existing contest between Mexico and Texas was not intended to be confined to the limits of that province or of ‘the theater of war,’ within which it was hardly to be presumed that any collision would occur or any question on the subject arise, but it was designed to extend everywhere and to include as well the United States and their ports as the territories of the conflicting parties. The exclusion of the vessels of Texas, while those of Mexico are admitted, is not deemed compatible with the strict neutrality which it is the desire and the determination of this Government to observe in respect to the present contest between those countries; nor is it thought necessary to scrutinize the character or authority of the flag under which they may sail, or the validity of the commission under which they may be commanded, when the rights of this country and its citizens are respected and observed. In this frank expression of the views and policy of the United States in regard to a matter of so much interest as the war now waging between Mexico and its revolted province, it is hoped that new evidence will be perceived, not only of the consistency and impartiality of this Government in its relations with foreign countries, but of the sincere desire which is entertained, by such an exposition of its course, to cherish and perpetuate that friendly feeling, which will see in the scrupulous regard that is paid to the rights of other, and even of rival, parties, one of the surest guarantees that its own will continue to be respected.”

Mr. Forsyth, Sec. of State, to Mr. Gorostiza, Mexican minister, Sept. 20, 1836, S. Ex. Doc. 1, 24 Cong. 2 sess. 81. See, also, Opinions of the Attorneys-General, III. 120.

The note of Mr. Forsyth was written in reply to a complaint of Mr. Gorostiza of the action of the collector of customs at New York in permitting a vessel under the Texan flag to enter that port. Mr. Gorostiza also expressed the hope that the United States would close its ports against Texan vessels,

and would not admit them to the rights of belligerents outside the territory which was the "theater of war." Quoting, in support of these positions, Mr. Monroe's statement that the United States had treated the South Americans as equal parties to a civil war as soon as the revolutionary movement had assumed "such a steady and consistent form as to make the success of the provinces probable," Mr. Gorostiza observed that there was "a great interval" between the commencement of that movement and the period at which its success seemed to be probable; that the United States meanwhile preserved a mere "*neutrality of expectancy* for the purpose of seeing whether those provinces did, or did not, possess the means of emancipating themselves," and that the Texan revolt had not reached the stage at which the Spanish Americans had arrived when belligerent rights were accorded them. (Mr. Gorostiza to Mr. Forsyth, Sept. 12, 1836, S. Ex. Doc. 1, 24 Cong. 2 sess. 74.)

Replying to this, Mr. Forsyth, in a passage immediately preceding that above quoted, says: "The course pursued by the collector of New York, in declining to exclude the vessel in question, which bore a flag alleged to be that of Texas, and the commander of which exhibited a commission purporting to be from the President of that country, or to seize or otherwise molest her after she had entered, was in accordance with the principles and practice which have been invariably observed by this Government from the breaking out of the revolution among the Spanish provinces on this continent to the present time. There is nothing contradictory of this position in the passage which Mr. Gorostiza has quoted from the message of Mr. Monroe, then President of the United States, to Congress of the 8th of March, 1822, when properly understood and construed in connection with the antecedent acts and declarations of the Executive. It is obvious that the exclusion of the vessels of the one party from the ports of the United States, and the admission of those of the other, would be inconsistent with an *impartial neutrality*; and yet the President, in the same message from which Mr. Gorostiza has quoted, states that 'through the whole of this contest the United States have remained *neutral*, and have fulfilled with the *utmost impartiality* all the obligations incident to that character.' In a previous message, of December 7th, 1819, he observes: 'In the civil war existing between Spain and the Spanish provinces in this hemisphere, the greatest care has been taken to enforce the laws intended to preserve an *impartial neutrality*. *Our ports have continued to be equally open to both parties and on the same conditions.*' This language plainly refers to the whole of the contest; and the President is not to be understood, in his subsequent message, to which Mr. Gorostiza has referred, as intending to say that the vessels of either party were only permitted to enter the ports of the United States *from the period when the success of such party is probable*. The construction which Mr. Gorostiza has given to the particular passage he has cited is not only contradicted by other passages from the messages of the same executive officer, but still more strongly, if possible, by the uniform acts of this Government in that and similar cases. It is a well-known fact that the vessels of the South American provinces were admitted into the ports of the United States, under their own or any other flags, from the commencement of the revolution; and it is equally true that throughout the various civil contests that have taken place at different periods among the states that sprung from that revolution the vessels of each of the contending parties have been alike permitted to enter the ports of this country." (S. Ex. Doc. 1, 24 Cong. 2 sess. 81-82.)

When this passage was written, it is not probable that Mr. Forsyth had before him the letter of Mr. Dallas to Mr. Duplessis of July 3, 1815, which appears to have been the first official order for the extension of hospitality in ports of the United States to vessels flying South American flags. The letter had not been printed in any public document. It is possible, however, that such vessels were in fact admitted by the customs officers at some ports before any order on the subject was issued by the Treasury; and it may in any event be said that the statement of Mr. Forsyth to Mr. Gorostiza is supported by passages in the messages of President Monroe of 1817 and 1822.

**Duty of Parent Government.** "It is now several years since the independence of Texas, as a separate government, has been acknowledged by the United States, and she has since been recognized in that character by several of the most considerable powers of Europe. \* \* \* No effort for the subjugation of Texas has been made by Mexico from the time of the battle of San Jacinto, on the 21st day of April, 1836, until the commencement of the present year; and during all this period Texas has maintained an independent government, carried on commerce, and made treaties with nations in both hemispheres, and kept aloof all attempts at invading her territory. If, under these circumstances, any citizen of the United States in whose behalf this Government has a right on any account or to any extent to interfere, should, on a charge of having been found with an armed Texan force acting in hostility to Mexico, be brought to trial and punished as for a violation of the municipal laws of Mexico, or as being her subject engaged in rebellion, after his release has been demanded by this Government, consequences of the most serious character would certainly ensue."

Mr. Webster, Sec. of State, to Mr. Thompson, minister to Mexico, April 15, 1842, Webster's Works, VI. 427, 434-435, in relation to citizens of the United States who were captured with the Texan expedition to Santa Fé, but who, as was believed, were not in any hostile sense parties to that expedition.

#### 5. BUENOS AYRES AND MONTEVIDEO, 1844.

#### § 63.

**Duty of Neutral Navies.** May 23, 1845, Mr. Bancroft, Secretary of the Navy, preferred against Captain Philip F. Voorhees a charge which, while in form a charge of disobedience of orders, embraced the substance of complaints made by the Argentine Confederation and its ally, General Oribe, of a violation by that officer of their belligerent rights. In March, 1844, Captain Voorhees was dispatched in the frigate *Congress*, by his commanding officer, Commodore Daniel Turner, to Montevideo, with orders to protect the commerce and interests of the United States in that quarter, and in so doing "to be extremely particular in all his official and private intercourse with the Montevidean and Buenos Ayrean governments," and

“to bear always in mind that it was not only the policy of our Government, but their earnest desire, to maintain a strict and unqualified neutrality in all things relating to the belligerents and to those countries generally.” When Captain Voorhees arrived off Montevideo, the port was blockaded by a squadron of the Argentine Confederation, against which Montevideo had declared war, and was besieged by land by General Oribe, who claimed to be the legal President of the Oriental Republic of Uruguay, and who was endeavoring, with the aid of the Government at Buenos Ayres, to recover Montevideo, whence he had been driven some months previously by a revolution. General Oribe held possession of nearly all the Oriental Republic except Montevideo, and displayed in his camp the Montevidean flag, which was also that of the Republic, and the flag of the Argentine Confederation, as that of his ally. The Montevideans, reinforced by large numbers of French, Italians, and other foreigners, held out against the siege and the blockade, and claimed to be the Government of the Republic. The United States had for years maintained a chargé d’affaires near the Government of the Argentine Confederation, and had received from it in 1838, as minister plenipotentiary and extraordinary, General Alvear, who still resided at Washington in that capacity. Diplomatic relations with Uruguay had never been established, but the United States maintained at Montevideo a consul, who was accredited to the Oriental Republic. The Government of the United States had taken no action upon the war between the Argentine Confederation and Montevideo, or upon the civil contest in Uruguay. The foreign naval forces in the River Plate conceded, however, the claims of the various parties to belligerent rights:

On the morning of Sunday, September 29, 1844, the armed schooner *Sancala*, which had been fitted out by General Oribe to cruise against the Montevidean fishermen who supplied the besieged with fish, came out of the port of Buseo, under the Montevidean flag, and chased an enemy fishing boat. The boat sought refuge alongside the American bark *Rosalba*, which had, unknown to the *Congress*, come out of Montevideo on the preceding night, and which was then lying, unrecognized and without any colors hoisted, near the frigate. The *Sancala* fired a volley of musketry at the boat and some of the balls struck the *Rosalba*, which then displayed her American colors. The *Sancala* drew off and anchored under the stern of the flagship of the Argentine squadron, and, after communicating with the commander, continued to cruise after fishing boats. Several hours later, Captain Voorhees, having been advised of the incident, sent out boats from the *Congress* and captured the *Sancala*. Her officers and crew were sent on board the *Congress* as prisoners, and the *Sancala* herself, under United States colors and with a crew from the *Congress*, chased and captured a schooner of the Argentine squadron, called the *Ninth of July*, and put a prize crew on board of her. The *Congress* then bore down on the

Argentine squadron, which was lying at anchor, compelled it to strike, caused all the officers to be sent on board, released all the Montevidean prisoners on the Argentine vessels, as well as some fishing boats held as prizes, and took from one of the vessels some seamen, who represented that they were citizens of the United States and that their terms of enlistment had expired. Subsequently the officers were returned to their vessels, and the Argentine commander renewed a protest which he had previously made against what had been done. On the 3rd of October he notified Captain Voorhees of the reestablishment of the blockade. Captain Voorhees acknowledged the receipt of this notice on the 5th of the same month, but on the 22nd informed the Argentine commander that he would no longer permit American vessels to be visited. The blockade was therefore suspended as to such vessels till the 3rd of November, when Commodore Turner, who had arrived off Montevideo on the 29th of October, directed that the belligerent rights of the Argentine Government be respected. On the 21st of November he also ordered the release of the *Sancala*, her officers and crew.

In the specifications by which the charge of disobedience was supported, the Secretary of the Navy alleged that Captain Voorhees had violated the orders of Commodore Turner of March, 1844, by the following specific acts:

1. By "wrongfully capturing and taking forcible possession of an armed vessel called the '*Sancala*,' belonging to a Government at peace with the Government of the United States and at war with the Government of Montevideo."

2. By "wrongfully capturing and taking forcible possession of a squadron of armed vessels belonging to a Government at peace with the Government of the United States and at war with the Government of Montevideo."

3. By "forcibly and wrongfully releasing prisoners and other property captured by, or in custody of, a squadron of vessels employed in blockading the port of Montevideo, the said squadron belonging to a Government at peace with the Government of the United States."

4. By "wrongfully and forcibly taking seamen from a squadron of vessels blockading the port of Montevideo, the said squadron belonging to a Government at peace with the Government of the United States."

5. By "refusing to permit a squadron of vessels employed in blockading Montevideo to enforce the blockade with respect to merchant vessels belonging to the United States, the said squadron belonging to a Government at peace with the Government of the United States."

The judge-advocate, in his opening statement, discussed the questions whether the *Sancala* was sailing under a false flag, with no authority to exercise belligerent rights, and whether her attack on the *Rosalba* was a piratical act, which outlawed her. He maintained the

negative of both questions.<sup>a</sup> He referred to the case of Capt. Daniel Turner, who, April 7, 1830, cut out the Buenos Ayrean privateer from a neutral harbor in St. Bartholomew, on representations of her having plundered an American vessel and the refusal of the neutral power to give her up; and to the case of Commodore David Porter, who, June 3, 1825, attacked a town in Porto Rico, landing and compelling the submission of the local authorities for having imprisoned Lieutenant Platt, whom he had, while in search of pirates, dispatched thither in search of supposed stolen goods. In both these cases, said the judge-advocate, "the invasion of national rights met with condemnation and rebuke from the Government of the United States."

Captain Voorhees, in his defense, stated that in capturing the *Sancala* he acted upon a communication brought to him by a midshipman, from the owner of the *Rosalba*, to the effect that a Buenos Ayrean schooner, sailing under Montevidean colors, had pursued and captured several Montevidean fishermen and had fired a volley of musketry into the bark. This, as reported, he considered an act of piracy, in which the commander of the Argentine squadron had, by approving and adopting it, made himself an accomplice. He also relied much on the case of the *Marianna Flora*.<sup>b</sup> He referred to the *Sancala* as a "daring marauder," and cited Klintock's case<sup>c</sup> to show that Oribe, not having been recognized as a belligerent by the United States, was not entitled to belligerent rights. He also said: "I received the highest testimonials of the approbation of my proceedings from the highest commanding officers in the English, French, and Brazilian squadrons. High commendation was bestowed upon me by the agent of my Government at Montevideo and by the American minister at Rio de Janeiro, and finally it was in the fullest and most distinct manner sanctioned and approved by my commanding officer, Commodore Turner, whose orders I am now charged with violating."

The court-martial found the accused guilty on each of the five specifications, and sentenced him to be reprimanded in a general order by the Secretary of the Navy and to be suspended for three years.<sup>d</sup> The verdict was approved and the sentence confirmed. The Secretary of the Navy, in carrying the sentence into effect, said: "I could desire not to add one word to the judgment of the court. \* \* \* But justice to our own Government, the relations of amity subsisting with the Argentine Republic, our avowed policy of neutrality between foreign belligerents, respect for the rights of a foreign flag, a firm adhesion to the humane principles of the modern code of maritime law, ever

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<sup>a</sup> The judge-advocate cited various writers on international law, and the case of the *Invincible*, opinion of Attorney-General Butler, May 17, 1836, 3 Op. 120.

<sup>b</sup> 11 Wheaton, 1.

<sup>c</sup> United States v. Klintock, 5 Wheaton, 144.

<sup>d</sup> MSS. Navy Department.

advocated and insisted upon by the American people, the determination to demand nothing but what is right, especially from a weaker power than our own, compel me to disavow and reprove your conduct as set forth in the charge and specifications of which you have been found guilty." <sup>a</sup> A transcript of this letter and of the finding and sentence of the court-martial were communicated to the Argentine minister, with an expression of the hope that his Government would see in it a satisfactory proof of the disposition of the United States "to respect the rights of Buenos Ayres." <sup>b</sup>

#### 6. PERU—THE VIVANCO INSURRECTION.

#### § 64.

"I shall not undertake to settle any general principle by which the true character of an insurrectionary movement in a country may be tested, and under what circumstances it becomes a contest for a change of government, giving to it the attributes, together with the first consequences, of a civil war. It is sufficient to say that the situation of the contending parties in Peru,<sup>c</sup> and the avowed objects of the revolutionary leaders, together with the extent of their operations, and also the extent and importance of the portion of the Republic which they occupied and governed at different periods of the struggle, made that contest a civil war. \* \* \* You consider some act of a foreign government recognizing the existence of such a war to be necessary before its citizens can claim the protection which the United States demand for their own. \* \* \* Cases have been put, and may be put again, which, in the opinion of high authorities, require such a measure before they carry with them the consequences attached to the condition of civil war. Such cases may relate to the declaration of a blockade, to a claim to search vessels as neutrals, and to the exercise of other belligerent powers assumed by the hostile rulers. By what public act, whether proclamation or otherwise, this recognition must take place I have not found laid down. I am not aware that in this country any solemn proceeding, either legislative or executive, has been adopted for the purpose of declaring the status of an insurrectionary movement abroad, and whether it is entitled to the attributes of civil war, unless, indeed, in the formal recognition of a portion of an empire seeking to establish its independence, which, in fact, does not so much admit its existence as it announces its result, at

<sup>a</sup> Mr. Bancroft, Sec. of the Navy, to Capt. Voorhees, Aug. 12, 1845, MSS. Navy Dept.

<sup>b</sup> Mr. Buchanan, Sec. of State, to Gen. Alvear, Oct. 25, 1845, MS. Notes to Argentine Confederation, VI. 17.

<sup>c</sup> During the Vivanco insurrection. See Moore, Int. Arbitrations, II. 1593 et seq.



least so far as regards the nation thus proclaiming its decision. But that is the case of the admission of a new member into the family of nations. Such is not the condition of Peru. She had already attained that position, and her intestine difficulties arose out of an effort to change the administration of the government, which was a matter of purely domestic concern, not touching foreign powers, unless in the progress of the contest their interests were brought into question. So long, therefore, as such a contest preserves its domestic character there is no necessity for external interposition unless, indeed, there be a determination to take part with and aid one of the parties by the direct application of force or by the exertion of political influence. Such has not been the policy of the United States, and they carefully abstained from all interference with the troubles in Peru, content to abide the decision which its people might make; and this Government permitted the diplomatic intercourse of the two countries to continue unchanged, as a measure demanded by their mutual interests and not as an acknowledgment of the pretensions of either of the rival parties. It is, therefore, unnecessary to advert to the effect of a formal recognition by the Executive, and how far that act of political power would be obligatory upon the courts of justice and binding upon the rights of individuals. Whether a civil war was prevailing in Peru is a question of fact, to be judged by the proofs, as the existence of a war between two independent nations is a similar question, to be determined in the same manner, whereas, as is often the case, at least in this country, there is no public authoritative recognition of it."

Mr. Cass, Sec. of State, to Mr. Osma, Peruvian minister, May 22, 1858, S. Ex. Doc. 69, 35 Cong. 1 sess. 17, 20, 24-25.

See opinion of Attorney-General Black, 1858, 9 Op. 140.

"Mr. Osma insists, however, that a civil war in one country can not be known to the people of another but through their own government; that the existence or nonexistence of civil war is a question not of fact, but of law, which no private person has a right to decide for himself; that foreigners must regard the former state of things as still existing, unless their respective governments have *recognized* the change. But I am very clearly of the opinion that an American citizen who goes to southern Peru may safely act upon the evidence of his own senses. If he sees that the former government has been expelled or overturned by a civil revolution, and a new one set up and maintained in its place, he can not be molested or even blamed for regulating his behavior by the laws thus established. Nay, he has no choice; the government *de facto* will compel his obedience. It will not give him leave to ignore the matter of fact while he waits for the solution of a legal problem at home. Besides, if he resists the authority of the party in possession on the ground that another has the right

of possession, he departs from his neutrality, and so violates the duty he owes to both the belligerents as well as to the laws of his own country."

Mr. Cass, Sec. of State, to Mr. Clay, minister to Peru, Nov. 26, 1858, MS. Inst. Peru, XV. 243.

See, also, Br. & For. State Papers (1859-1860), L. 1126; id. (1860, 1861), LI.

#### 7. MEXICO.

##### § 65.

"I have the honor to inform you that both Mr. McLane, our minister to Mexico, and Mr. Mata, the Mexican minister here, have stated to this Department that there is reason to believe that arrangements are making by what is known as the Miramon government of Mexico to establish a blockade of Vera Cruz and other ports upon the Gulf of Mexico. The President has decided that no such blockade will be recognized by the United States, and I have to request that the necessary orders for the protection of American commerce in the Gulf against any such attempt may be given to the proper naval officers."

**Miramon Government; Question of Blockade.**

Mr. Cass, Sec. of State, to Mr. Toucey, Sec. of the Navy, March 10, 1860, 52 MS. Dom. Let. 37.

"This Government has long recognized, and still does continue to recognize, the constitutional government of the United States of Mexico as the sovereign authority in that country, and the President, Benito Juarez, as its chief."

**Governments of Juarez and Maximilian.**

This Government, at the same time, equally recognizes the condition of war existing in Mexico between that country and France. We maintain absolute neutrality between the belligerents, and we do not assume to judge, much less to judge in advance, of the effect of the war upon titles or estates."

Mr. Seward, Sec. of State, to Mr. Geofroy, French minister, April 6, 1864, Dip. Cor. 1864, III. 212.

#### 8. THE CONFEDERATE STATES.

##### § 66.

Mr. Seward, in his instructions to Mr. Adams, of May 21, 1861, stated that "a concession of belligerent rights" by Great Britain to the Confederate States would "be liable to be construed" as a recognition of their independence, and would not "pass unquestioned by the United States." Subsequently, having heard of the Queen's proclamation of neutrality

**Action of Various Powers; Position of Mr. Seward.**

<sup>a</sup> Dip. Cor. 1861, 89. A facsimile of Mr. Seward's draft of these instructions, with President Lincoln's interlineations and corrections, is given in an article entitled "A famous diplomatic dispatch," in the North American Review, April, 1886.

of the 13th of May, Mr. Seward observed that its issuance was "remarkable"—first, because it was made on the very day of Mr. Adams' arrival in London, without according him the reception and interview for which his predecessor had arranged, and, secondly, because of "the tenor of the proclamation itself, which seems to recognize, in a vague manner, indeed, but does seem to recognize, the insurgents as a *belligerent national power*."<sup>a</sup> In an instruction to Mr. Dayton, minister to France, of May 30, 1861, Mr. Seward said: "The United States can not for a moment allow the French Government to rest under the delusive belief that they will be content to have the Confederate States recognized as a belligerent power by states with which this nation is in amity."<sup>b</sup> The French declaration of neutrality was issued June 10, 1861, that of Spain June 17, and that of the Netherlands in the same month. The Emperor of Brazil issued a similar declaration August 1, 1861. Declarations, decrees, or notifications were issued by other maritime powers.<sup>c</sup> In a conversation with Earl Russell, June 12, 1861, Mr. Adams, referring to the British recognition of Confederate belligerency, observed that, "at any rate, there was one compensation, the act had released the Government of the United States from responsibility for any misdeeds of the rebels towards Great Britain. If any of their people should capture or maltreat a British vessel on the ocean, the reclamation must be made only upon those who had authorized the wrong. The United States would not be liable."<sup>d</sup> In April, 1862, Mr. Adams and Mr. Dayton were respectively authorized, in their discretion, to submit to the British and French Governments certain representations looking to the revocation or "revision" of their recognition of Confederate belligerency.<sup>e</sup>

"This Government insists now in these cases, as it insisted in the beginning of our domestic strife, that the decisions of the Emperor's

<sup>a</sup> Mr. Seward, Sec. of State, to Mr. Adams, minister to England, June 3, 1861, Dip. Cor. 1861, 97.

<sup>b</sup> Dip. Cor. 1861, 215. See also Mr. Seward to Mr. Dayton, June 17, June 22, and July 6, 1861, id. 224, 229, 231-234.

<sup>c</sup> Moore, Int. Arbitrations, I. 595.

<sup>d</sup> Mr. Adams, minister to England, to Mr. Seward, Sec. of State, Dip. Cor. 1861, 87, 89; Lawrence's Wheaton (1863), 44. "It is easy to see what they [the United States] gained [by the acknowledgment of Confederate belligerency]. They gained the liberty to exercise against British ships on the high seas the rights of visit and search, of capturing contraband, and of blockade—rights which spring solely from the relation of belligerent and neutral, and which the neutral acknowledges by recognizing the existence of that relation. The advantages reaped in maritime war from the exercise of such rights fall, where there is a disparity of force, into the hands of the stronger belligerent; where the disparity is great he has a monopoly of them, for he is able to shut up his enemy in port and drive him from the sea." (Bernard's Neutrality of Gr. Brit. 167.)

<sup>e</sup> Mr. Seward, Sec. of State, to Mr. Adams, minister to England, April 16, 1862, Dip. Cor. 1862, 73; Mr. Seward, Sec. of State, to Mr. Dayton, minister to France, April 17, 1862, Dip. Cor. 1862, 333.

Government, like those of other maritime powers, by which the insurgents of this country, without a port or a ship or a court of admiralty, are recognized by France as a naval belligerent, are in derogation of the law of nations and injurious to the dignity and sovereignty of the United States; that they have never approved or acquiesced in those decrees, and that they regard these late proceedings in relation to the Florida and Georgia, like those of a similar character which have occurred in previous cases, as just subjects of complaint. The same views are entertained so far as they apply to the new maritime regulations. We claim that we are entitled to have our national vessels received in French ports with the same courtesy that we ourselves extend to French ships of war, and that all real or pretended insurgent vessels ought to be altogether excluded from French ports. We expect the time to come, and we believe it is not distant, when this claim will be acknowledged by France to be both reasonable and just."

Mr. Seward, Sec. of State, to Mr. Dayton, minister to France, March 21, 1864, *Dip. Cor.* 1864, III. 55.

"It gives me great pleasure to acknowledge that, beyond what we deem the original error of France in recognizing, unnecessarily, as we think, the insurgents as a belligerent, we have every reason to appreciate the just and impartial observance of neutrality which has been practiced in the ports and harbors of France by the Government of the Emperor. In any case it will be hereafter, as it has been hitherto, a pleasing duty to conduct all our belligerent proceedings so as to inflict no wrong or injury upon the Government or the people of the French Empire." (Mr. Seward, Sec. of State, to Mr. Dayton, minister to France, April 24, 1863, *Dip. Cor.* 1863, I. 662.)

"The steadfast determination of the Government neither to say nor do anything which could reasonably be construed into an interference was tested in November, 1862, when it was proposed by the Emperor of the French that the Courts of France, Russia, and Great Britain should tender their good offices to both belligerents, in the hope of preparing the way for an accommodation. M. Drouyn de l'Huys, in addressing himself to the British Government, dwelt on the 'innumerable calamities and immense bloodshed' which attended the war, and on the evils which it inflicted upon Europe. The two contending parties, he said, had up to that time fought with balanced success, and there appeared to be no probability that the strife would soon terminate. He proposed, therefore, that the three courts should join in recommending an armistice for six months, during which means might be discovered for effecting a lasting pacification. The British Government declined to take part in such a recommendation, being satisfied that there was no reasonable prospect of its being entertained by that of the United States. 'Depend upon it, my lords,' said Earl Russell, addressing the House of Peers in 1863, 'that, if this war is to cease, it is far better that it should cease by a conviction both on the part of the North and on that of the South that they can never live together again happily as one community and as one Republic, and that the termination of hostilities can never be brought about by the advice, the mediation, or the interference of any European power.'" (Bernard's *Neutrality of Gr. Br.*, 467.)

See, further, as to the recognition of Confederate belligerency, S. Ex. Doc. 11, 41 Cong. 1 sess.; Phillimore, *Int. Law*, II. (3d ed.) 25; speech of Sir G. C. Lewis, Oct. 17, 1862, cited by Lawrence, *Com. sur droit int.*, I. 200; Goldwin Smith, *Macmillan's Mag.* XIII. 168, C. F. Adams, *Lee at Appomattox and other papers*, 98-101, 199-203.

June 2, 1865, Earl Russell instructed Sir Frederick Bruce, the British minister at Washington, to inform the Government of the United States that Her Majesty's Government, having received copies of the President's

**Withdrawal of  
recognition.**

proclamation of May 10 declaring that armed resistance to the United States was virtually at an end, and having heard of the surrender or dispersal of most of the Confederate armies and the capture of Mr. Jefferson Davis, had, after communication with the French Government, determined, although it would have been more satisfactory if the United States had also declared that it renounced the exercise, as regarded neutrals, of the rights of a belligerent, to consider the war to have ceased *de facto* and peace to have been reestablished throughout the territory of the United States; and that Her Majesty's Government would immediately direct that admission to British waters be refused to Confederate vessels of war, while any such vessels already in those waters should, unless divested of their warlike character, be required to depart, with the benefit, for the last time, of the prohibition against their being pursued within twenty-four hours by a cruiser of the United States lying at the moment within the same port.<sup>a</sup> Mr. Seward protested against this reservation,<sup>b</sup> and, in communicating the correspondence to the Secretary of the Navy, advised that the naval officers of the United States be acquainted with "the results following therefrom, namely: First, Great Britain withdraws her cession heretofore made of a belligerent character from the insurgents; secondly, that the withdrawal of the twenty-four hours' rule has not been made absolute by Great Britain, and that therefore the customary courtesies are not to be paid by our vessels to those of the British navy; thirdly, the right of search of British vessels is terminated (of course this has no bearing upon the operation of the existing slave-trade treaty); fourthly, any insurgent or piratical vessels found on the high seas may be lawfully captured by vessels of the United States."<sup>c</sup> Mr. Welles, June 22, 1865, issued instructions to the Navy to the effect that France had "withdrawn from the insurgents the character of belligerents" and removed all restrictions on naval intercourse; that Great Britain had taken similar action, but that, as her withdrawal of the twenty-four hours' rule was not absolute, "reciprocal measures" would be extended to her vessels; that

<sup>a</sup> Dip. Cor. 1865, I. 409.

<sup>b</sup> Dip. Cor. 1865, I. 407-408.

<sup>c</sup> Mr. Seward, Sec. of Statc, to Mr. Welles, Sec. of the Navy, June 19, 1865, Dip. Cor. 1865, I. 410.

the blockade of the ports and coast of the United States would soon cease, and that with the cessation of hostilities the belligerent right of search would also cease.<sup>a</sup> On June 23 the President issued a proclamation terminating the blockade.<sup>b</sup> In a letter to the lords of the admiralty of October 13, 1865, Earl Russell, adverting to the reservation as to the twenty-four hours' rule, stated that all restrictive measures on United States men-of-war in British waters were to be considered as at an end.<sup>c</sup> Mr. Welles was in consequence requested to inform the officers of the Navy that the instructions previously given them "to make discriminations in regard to their visits in British ports and their intercourse with British naval vessels" were countermanded and withdrawn.<sup>d</sup>

Spain, by a royal decree of June 4, 1865, annulled the royal decree of June 17, 1861, declaring her neutrality, and thus withdrew her concession of belligerent rights to the Confederacy.<sup>e</sup>

"This subject [of the recognition of belligerency] received a full Correspondence of discussion in the correspondence between Mr. Adams and Mr. Adams and Earl Russell, beginning April 7 and ending September 18, 1865. The principal contest was whether Earl Russell, 1865.

the recognition by Great Britain of belligerent rights in the rebel States was 'unprecedented and precipitate,' as alleged by Mr. Adams. \* \* \* The rule Mr. Adams lays down is this: 'Whenever an insurrection against the established government of a country takes place, the duty of governments, under obligations to maintain peace and friendship with it, appears to be, at first, to abstain carefully from any step that may have the smallest influence in affecting the result. Whenever facts occur of which it is necessary to take notice, either because they involve a necessity of protecting personal interests at home or avoiding an implication in the struggle, then it appears to be just and right to provide for the emergency by specific measures, precisely to the extent that may be required, but no farther. It is, then, facts alone, and not appearances or presumptions, that justify action. But even these are not to be dealt with farther than the occasion demands; a rigid neutrality in whatever is done is of course understood. If, after the lapse of a reasonable period, there be little prospect of a termination of the struggle, especially if this be carried on upon the ocean, a recognition of the parties as belligerents appears to be justifiable; and at that time, so far as I can ascertain, such a step has never in fact been objected to.' He contends that the

<sup>a</sup> Dip. Cor. 1865, I. 414.

<sup>b</sup> Dip. Cor. 1865, I. 412. See also, as to the action of Great Britain, id. 433, 445, 453.

<sup>c</sup> Dip. Cor. 1865, I. 611.

<sup>d</sup> Dip. Cor. 1865, I. 627-628.

<sup>e</sup> Dip. Cor. 1865, II. 540.

recognition of belligerent rights in the American colonies, in their war of independence, by France and Holland, was not made generally and for all purposes, but only to meet existing facts, and not until the presence of American war vessels in their ports made a decision necessary; and that France and England alike seemed to consider that a recognition of belligerency was an unfriendly act, unless justified by necessity. He considers the belligerent rights of the South American provinces to have been recognized upon the same principles, and refers to late civil wars in Europe, involving states more or less maritime, where no such recognition had been made. He contends that the recognition in this instance created all the naval power the rebellion possessed, and was so influential upon its subsequent history that Great Britain and France are not entitled to the argument that the event justified their action. Earl Russell does not seem to differ from Mr. Adams on the general principles. He contends that the state of things upon which the Government was required to act had no exact parallel, and must be judged by itself. He protests that the overt and formal acts of the parties to the war are not alone to be considered; and, referring to the extent of the territory, population, and resources of the rebellion; the existence of its completely organized State and general governments; its unequivocal determination to treat as war, by sea and land, any acts of authority which the United States, on the other hand, had equally determined to exert; the long antecedent history and preparations for this revolution; and the certainty of the magnitude and extent of the war and its rapid development whenever it should begin, and that it would require the instant decision of maritime questions by neutral vessels of war and merchantmen alike, he argues that it was necessary for England to determine at once, upon facts and probabilities, whether she should permit the right of search and blockade as acts of war, and whether the letters of marque and public ships of the rebels, which might appear at once in many parts of the world, should be treated as pirates or as lawful belligerents. On this subject, see further Mr. Bemis's pamphlets on the Recognition of Belligerency, Boston, 1865; letter of Mr. Harcourt ('Historicus'), London Times, March 22, 1865; Lord Lyons to Lord J. Russell, April 22, 1861; Mr. Bright's speech, March 13, 1865; Earl Russell's speech, March 23, 1865; proclamations of President Lincoln of 15th and 19th April, 1861, and of Jefferson Davis, 17th April, 1861, and of Queen Victoria, 13th May, 1861."

Note of Mr. Dana, Dana's Wheaton, § 23, note 15, pp. 37-38.

The correspondence referred to in Mr. Dana's note is as follows: Mr. Adams to Earl Russell, April 7, 1865, Dip. Cor. 1865, I. 316; Earl Russell to Mr. Adams, May 4, 1865, id. 356; Mr. Adams to Earl Russell, May 20, 1865, id. 375; Earl Russell to Mr. Adams, Aug. 30, 1865, id. 536; Mr. Adams to Earl Russell, Sept. 18, 1865, id. 554.

Mr. Dana fails to bring out in his summary of the correspondence Earl Russell's strenuous assertion of the position that President Lincoln's proclamation of blockade of April 19, 1861, was itself a recognition, and the first recognition, of the belligerency of the Confederate States. Denying in his note of May 4, 1865, that the Queen's proclamation of neutrality of May 13, 1861, was "precipitate," Earl Russell declared: "It was, on the contrary, your own Government which, in assuming the belligerent right of blockade, recognized the Southern States as belligerents. Had they not been belligerents the armed ships of the United States would have had no right to stop a single British ship upon the high seas." Earl Russell maintains this position by an extended argument which he supplemented in his note of Aug. 30, 1865 (Dip. Cor. 1865, I. 538) with a long quotation from the opinion of the Supreme Court of the United States in the prize cases.

**Decisions of the Supreme Court.** "Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the government. A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. \* \* \* If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. \* \* \* And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be '*unilateral*.' \* \* \* The law of nations \* \* \* contains no such anomalous doctrine as that which this court are now for the first time desired to pronounce, to wit: That insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities, are not enemies because they are traitors; and a war levied on the government by traitors, in order to dismember and destroy it, is not a war because it is an '*insurrection*.' \* \* \* The proclamation of blockade is itself official and conclusive evidence to the court that a state of war existed which demanded and authorized a recourse to such a measure under the circumstances peculiar to the case."

Prize Cases (1862), 2 Black, 635.

Four vessels were involved in these cases—the schooner Crenshaw, captured May 17, 1861; the British bark Hiawatha, captured May 20; the Mexican schooner Brilliant, captured June 23; the British brig Amy Warwick, captured July 10.

The President, April 19, 1861, proclaimed a blockade of the ports of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas, "in pursuance of the laws of the United States, and of the law of nations in such case provided."



April 27 he proclaimed a blockade of the ports of Virginia and North Carolina. "It would seem, then, that if the British Government erred in thinking that the war began as early as Mr. Lincoln's proclamation in question, they erred in company with our Supreme Court. (See the 'Alabama question,' *New Englander* for July, 1869; *Black's Reports*, ii, 635 *ff.*; *Dana on Wheaton*, 374, 375; *Lawrence's Wheaton* (2d ed., *supplem.*), p. 13; and *Pomeroy's Introd. to Constit. Law*, §§ 447-453.)" (*Woolsey, Int. Law*, app. iii, note 19.)

In the *Prize Cases* it was "simply held, that when parties in rebellion had occupied and held in a hostile manner a portion of the territory of the country, declared their independence, cast off their allegiance, organized armies, and commenced hostilities against the Government of the United States, war existed; that the President was bound to recognize the fact, and meet it without waiting for the action of Congress; that it was for him to determine what degree of force the crisis demanded, and whether the hostile forces were of such magnitude as to require him to accord to them the character of belligerents; and that he had the right to institute a blockade of ports in their possession, which neutrals were bound to recognize. It was also held, that as the rebellious parties had formed a confederacy, and thus become an organized body, and the territory occupied by them was defined, and the President had conceded to this organization in its military character belligerent rights, all the territory must be regarded as enemy's territory, and its inhabitants as enemies, whose property on the high seas would be lawful subjects of capture. There is nothing in these doctrines which justified the Confederate States in claiming the *status* of foreign States during the war, or in treating the inhabitants of the loyal States as alien enemies."

*Williams v. Bruffy* (1877), 96 U. S. 176, 189.

"To the Confederate Government was conceded, in the interest of humanity, and to prevent the cruelties of reprisals and retaliation, such belligerent rights as belonged, under the law of nations, to the armies of independent Governments engaged in war against each other. The Confederate States were belligerents in the sense attached to that word by the law of nations."

*Harlan, J., Ford v. Surget*, 97 U. S. 594.

"It has been held by this court in repeated instances that, though the late war was not between independent nations, yet, as it was between the people of different sections of the country, and the insurgents were so thoroughly organized and formidable as to necessitate their recognition as belligerents, the usual incidents of a war between independent nations ensued. The rules of war, as recognized by the public law of civilized nations, became applicable to the contending forces. Their adoption was seen in the exchange of prisoners, the release of officers on parole, the recognition of flags of truce, and

other arrangements designed to mitigate the rigors of warfare. The inhabitants of the Confederate States on the one hand, and the States which adhered to the Union on the other, became enemies, and subject to be treated as such, without regard to their individual opinions or dispositions; while during its continuance commercial intercourse between them was forbidden, contracts between them were suspended, and the courts of each were closed to the citizens of the other. *Brown v. Hatts*, 15 Wall. 177, 184."

*United States v. Pacific Railroad*, 120 U. S. 227, 233 (1887).

"The rights and obligations of a belligerent were conceded to it [the Confederate Government], in its military character, very soon after the war began, from motives of humanity and expediency by the United States."

*Thorington v. Smith*, 8 Wall. 1, quoted in *Baldy v. Hunter*, 171 U. S. 388, 393 (1898).

"The President recognizes the right of every power, when a civil conflict has arisen within another state, and has attained a sufficient complexity, magnitude, and completeness, to define its own relations and those of its citizens and subjects toward the parties to the conflict, so far as their rights and interests are necessarily affected by the conflict.

Position of Mr.  
Fish.

"The necessity and the propriety of the original concession of belligerency by Great Britain at the time it was made have been contested and are not admitted. They certainly are questionable, but the President regards that concession as a part of the case only so far as it shows the beginning and the animus of that course of conduct which resulted so disastrously to the United States. It is important, in that it foreshadows subsequent events.

"There were other powers that were contemporaneous with England in similar concession, but it was in England only that the concession was supplemented by acts causing direct damage to the United States. The President is careful to make this discrimination, because he is anxious as much as possible to simplify the case and to bring into view these subsequent acts, which are so important in determining the question between the two countries."

Mr. Fish, Sec. of State, to Mr. Motley, minister to England, May 15, 1869, in relation to the Alabama claims. (S. Ex. Doc. 11, 41 Cong. 3 Sess. 4-5.)

Mr. Motley was also instructed, in his private as well as his official intercourse, "to place the cause of grievance against Great Britain, not so much upon her recognition of the insurgents' state of war, but upon her conduct under and subsequent to such recognition."

See Moore, *International Arbitrations*, I. 499, 512 et seq.

Mr. Fish, in an instruction to Mr. Motley, Sept. 25, 1869, amplified his view, as follows:

"The President does not deny, on the contrary he maintains, that every sovereign power decides for itself, on its responsibility, the question whether or not it will, at a given time, accord the status of belligerency to the insurgent subjects of another power, as also the larger question of the independence of such subjects and their accession to the family of sovereign states.

"But the rightfulness of such an act depends on the occasion and the circumstances, and it is an act, like the sovereign act of war, which the morality of the public law and practice requires should be deliberate, seasonable, and just, in reference to surrounding facts; national belligerency, indeed, like national independence, being but an existing fact, officially recognized as such, without which such a declaration is only the indirect manifestation of a particular line of policy.

"But circumstances might arise to call for it. A ship of the insurgents might appear in the port of the neutral, or a collision might occur at sea, imposing on the neutral the necessity to act. Or actual hostility might have continued to rage in the theater of insurgent war, combat after combat might have been fought for such a period of time, a mass of men may have engaged in actual war until they should have acquired the consistency of military power, to repeat the idea of Mr. Canning, so as evidently to constitute the fact of belligerency and to justify the recognition by the neutral. Or the nearness of the seat of hostilities to the neutral may compel the latter to act; it might be his sovereign duty to act, however inconvenient such action should be to the legitimate Government." (For. Rel. 1873, III. 336.)

#### 9. CUBA.

#### § 67.

"I have the honor, by the President's direction, to offer a few suggestions as a basis for orders to the Commander of the North Atlantic Squadron during the existing civil war in Cuba. Those hostilities must be regarded as

**Insurrection of  
1868.**

strictly of a domestic character. As such they can not impart to Spain, under the public law or our treaties with her, any belligerent rights on the high seas, nor have we recognized such rights anywhere as possessed by those who are in arms against Spanish authority in that island. The right of search for contraband is a right to be exercised against a public enemy only on the high seas. It can not there lawfully be exercised against a neutral who has not recognized both parties as belligerents. If, therefore, the commander of our men-of-war should ascertain that a vessel of the United States is about to be searched on the high seas by a Spanish vessel they may be authorized to resist such search with all the force at their disposal. If, also, they should fall in with a vessel of the United States which has been captured by a Spaniard on the high seas on the ground of being a carrier of contraband, or on any other pretext involving a claim to belligerent rights in that quarter, they may be authorized to recapture the prize if they should feel competent for that purpose. \* \* \* It is presumed to be unnecessary to suggest that the naval commanders should be ordered to be careful as to facts, to be firm and vigilant in protecting their countrymen, but at the same time avoid giving occasion for unnecessary or unprofitable controversy with Spain by touching upon her unquestionable rights."

Mr. Fish, Sec. of State, to Mr. Borie, Sec. of the Navy, May 18, 1869, 81 MS. Dom. Let. 124.

"I am requested by the Secretary to say to you that he has been told that the counsel of the 'Hornet' will probably insist upon and try to make much of the recognition of Cuba by Peru, Chile, and Mexico, and will claim that the United States have offered their 'mediation' in behalf of the Cubans, which by the public law can only be offered as between recognized belligerents. The Secretary desires me to say to you in answer to this:

"1st. That we have no intelligence that Chile has acted at all in this matter.

"2d. That Mexico has not recognized a state of belligerency, but has authorized the Cuban flag to be received in their ports.

"3d. That it is not true that the United States have offered to mediate between the parties. They have only offered to Spain their 'good offices' to bring about a settlement which is a very different thing, and one that may well be done by a neutral between a sovereign power and insurgents in arms against it.

"4th. That the light in which the Cubans are regarded can in no event make any difference on an arraignment for an alleged violation of the provisions of the statutes of 1818."

Mr. J. C. B. Davis, Assistant Secretary, to Mr. Phelps, U. S. Dist. Att'y, New York, Oct. 14, 1869, 82 MS. Dom. Let. 195.

"The contest [in Cuba] has at no time assumed the conditions which amount to a war in the sense of international law, or which would show the existence of a *de facto* political organization of the insurgents sufficient to justify a recognition of belligerency.

President Grant's  
Message, 1869.

"The principle is maintained, however, that this nation is its own judge when to accord the rights of belligerency, either to a people struggling to free themselves from a government they believe to be oppressive, or to independent nations at war with each other."

President Grant, First Annual Message, Dec. 6, 1869.

See, as to the position of President Grant and Mr. Fish on the question of recognizing Cuban belligerency, J. C. Bancroft Davis, Mr. Fish and the Alabama Claims, 20-21, 35-36; The Atlantic Monthly, February, 1894, 217-218.

"The question of belligerency is one of fact not to be decided by sympathies for or prejudices against either party. The relations between the parent state and the insurgents must amount, in fact, to war in the sense of international law. Fighting, though fierce and protracted, does not alone constitute war; there must be military forces acting in accordance with the rules and customs of war—flags of truce, cartels, exchange of prisoners, &c.—and to justify a recognition of belligerency there must be, above all, a *de facto* political organization of the insurgents suffi-

Special message,  
June 13, 1870.

cient in character and resources to constitute it, if left to itself, a state among nations capable of discharging the duties of a state, and of meeting the just responsibilities it may incur as such toward other powers in the discharge of its national duties.

“Applying the best information which I have been enabled to gather, whether from official or unofficial sources, including the very exaggerated statements which each party gives to all that may prejudice the opposite or give credit to its own side of the question, I am unable to see, in the present condition of the contest in Cuba, those elements which are requisite to constitute war in the sense of international law.

“The insurgents hold no town or city; have no established seat of government; they have no prize courts; no organization for the receiving and collecting of revenue; no seaport to which a prize may be carried or through which access can be had by a foreign power to the limited interior territory and mountain fastnesses which they occupy. The existence of a legislature representing any popular constituency is more than doubtful.

“In the uncertainty that hangs around the entire insurrection there is no palpable evidence of an election, of any delegated authority, or of any government outside the limits of the camps occupied from day to day by the roving companies of insurgent troops. There is no commerce; no trade, either internal or foreign; no manufactures.

“The late commander in chief of the insurgents, having recently come to the United States, publicly declared that ‘all commercial intercourse or trade with the exterior world has been utterly cut off,’ and he further added, ‘To-day we have not ten thousand arms in Cuba.’

“It is a well-established principle of public law that a recognition by a foreign State of belligerent rights to insurgents under circumstances such as now exist in Cuba, if not justified by necessity, is a gratuitous demonstration of moral support to the rebellion. Such necessity may yet hereafter arrive, but it has not yet arrived, nor is its probability clearly to be seen.

“If it be war between Spain and Cuba, and be so recognized, it is our duty to provide for the consequences which may ensue in the embarrassment to our commerce and the interference with our revenue.

“If belligerency be recognized, the commercial marine of the United States becomes liable to search and to seizure by the commissioned cruisers of both parties—they become subject to the adjudication of prize courts.

“Our large coastwise trade between the Atlantic and the Gulf States, and between both and the Isthmus of Panama and the States of South America (engaging the larger part of our commercial marine) passes, of necessity, almost in sight of the island of Cuba. Under the treaty with Spain of 1795, as well as by the law of nations, our vessels will be

liable to visit on the high seas. In case of belligerency, the carrying of contraband, which now is lawful, becomes liable to the risks of seizure and condemnation. The parent Government becomes relieved from responsibility for acts done in the insurgent territory, and acquires the right to exercise against neutral commerce all the powers of a party to a maritime war. To what consequences the exercise of those powers may lead, is a question which I desire to commend to the serious consideration of Congress."

President Grant, special message, June 13, 1870.

"A recognition of the independence of Cuba being, in my opinion, impracticable and indefensible, the question which  
**Annual message,** next presents itself is that of the recognition of bel-  
**1875.** ligerent rights in the parties to the contest.

In a former message to Congress I had occasion to consider this question, and reached the conclusion that the conflict in Cuba, dreadful and devastating as were its incidents, did not rise to the fearful dignity of war. Regarding it now, after this lapse of time, I am unable to see that any notable success, or any marked or real advance on the part of the insurgents, has essentially changed the character of the contest. It has acquired greater age, but not greater or more formidable proportions. It is possible that the acts of foreign powers, and even acts of Spain herself, of this very nature, might be pointed to in defense of such recognition. But now, as in its past history, the United States should carefully avoid the false lights which might lead it into the mazes of doubtful law and of questionable propriety, and adhere rigidly and sternly to the rule, which has been its guide, of doing only that which is right and honest and of good report. The question of according or of withholding rights of belligerency must be judged, in every case, in view of the particular attending facts. Unless justified by necessity, it is always, and justly, regarded as an unfriendly act, and a gratuitous demonstration of moral support to the rebellion. It is necessary, and it is required, when the interests and rights of another Government or of its people are so far affected by a pending civil conflict as to require a definition of its relations to the parties thereto. But this conflict must be one which will be recognized in the sense of international law as war. Belligerence, too, is a fact. The mere existence of contending armed bodies, and their occasional conflicts, do not constitute war in the sense referred to. Applying to the existing condition of affairs in Cuba the test recognized by publicists and writers on international law, and which have been observed by nations of dignity, honesty, and power, when free from sensitive or selfish and unworthy motives, I fail to find in the insurrection the existence of such a substantial political organization, real, palpable, and manifest to the world, having the forms and capable of the ordinary functions of gov-

ernment toward its own people and to other states, with courts for the administration of justice, with a local habitation, possessing such organization of force, such material, such occupation of territory, as to take the contest out of the category of a mere rebellious insurrection, or occasional skirmishes, and place it on the terrible footing of war, to which a recognition of belligerency would aim to elevate it. The contest, moreover, is solely on land; the insurrection has not possessed itself of a single sea-port whence it may send forth its flag, nor has it any means of communication with foreign powers except through the military lines of its adversaries. No apprehension of any of those sudden and difficult complications which a war upon the ocean is apt to precipitate upon the vessels, both commercial and national, and upon the consular officers of other powers, calls for the definition of their relations to the parties to the contest. Considered as a question of expediency, I regard the accordance of belligerent rights still to be as unwise and premature, as I regard it to be, at present, indefensible as a measure of right. Such recognition entails upon the country according the rights which flow from it difficult and complicated duties, and requires the exaction from the contending parties of the strict observance of their rights and obligations. It confers the right of search upon the high seas by vessels of both parties; it would subject the carrying of arms and munitions of war, which now may be transported freely and without interruption in the vessels of the United States, to detention and to possible seizure; it would give rise to countless vexatious questions, would release the parent Government from responsibility for acts done by the insurgents, and would invest Spain with the right to exercise the supervision recognized by our treaty of 1795 over our commerce on the high seas, a very large part of which, in its traffic, between the Atlantic and the Gulf States, and between all of them and the States on the Pacific, passes through the waters which wash the shores of Cuba. The exercise of this supervision could scarce fail to lead, if not to abuses, certainly to collisions perilous to the peaceful relations of the two states. There can be little doubt to what result such supervision would before long draw this nation. It would be unworthy of the United States to inaugurate the possibility of such result, by measures of questionable right or expediency, or by any indirection. Apart from any question of theoretical right, I am satisfied that, while the accordance of belligerent rights to the insurgents in Cuba might give them a hope, and an inducement to protract the struggle, it would be but a delusive hope, and would not remove the evils which the Government and its people are experiencing, but would draw the United States into complications which it has waited long and already suffered much to avoid."

**Insurrection of 1895.** "Cuba is again gravely disturbed. An insurrection, in some respects more active than the last preceding revolt, which continued from 1868 to 1878, now exists in a large part of the eastern interior of the island, menacing even some populations on the coast."

President Cleveland, Annual Message, Dec. 2, 1895. See, also, opinion of Attorney-General Harmon, Dec. 10, 1895, 21 Op. 267.

**President Cleveland's message, 1896.** "As the contest has gone on, the pretense that civil government exists on the island, except so far as Spain is able to maintain it, has been practically abandoned. Spain does keep on foot such a government, more or less imperfectly, in the large towns and their immediate suburbs. But that exception being made, the entire country is either given over to anarchy or is subject to the military occupation of one or the other party. It is reported, indeed, on reliable authority that, at the demand of the commander in chief of the insurgent army, the putative Cuban government has now given up all attempt to exercise its functions, leaving that government confessedly (what there is the best reason for supposing it always to have been in fact) a government merely on paper. \* \* \* It was at first proposed that belligerent rights should be accorded to the insurgents—a proposition no longer urged because untimely and in practical operation clearly perilous and injurious to our own interests."

President Cleveland, Annual Message, Dec. 7, 1896.

**President McKinley's Message, 1897.** "Recognition of the belligerency of the Cuban insurgents has often been canvassed as a possible if not inevitable step both in regard to the previous ten years' struggle and during the present war. I am not unmindful that the two Houses of Congress in the spring of 1896 expressed the opinion by concurrent resolution that a condition of public war existed requiring or justifying the recognition of a state of belligerency in Cuba, and during the extra session the Senate voted a joint resolution of like import, which, however, was not brought to a vote in the House of Representatives. In the presence of these significant expressions of the sentiment of the legislative branch it behooves the Executive to soberly consider the conditions under which so important a measure must needs rest for justification. It is to be seriously considered whether the Cuban insurrection possesses beyond dispute the attributes of statehood, which alone can demand the recognition of belligerency in its favor. Possession, in short, of the essential qualifications of sovereignty by the insurgents and the conduct of the war by them according to the received code of war are no less important factors toward the determination of the problem of belligerency than are the influences and consequences of the struggle upon the internal polity of the recognizing state."



“The wise utterances of President Grant in his memorable message of December 7, 1875, are signally relevant to the present situation in Cuba, and it may be wholesome now to recall them. At that time a ruinous conflict had for seven years wasted the neighboring island. During all those years an utter disregard of the laws of civilized warfare and of the just demands of humanity, which called forth expressions of condemnation from the nations of Christendom; continued unabated. Desolation and ruin pervaded that productive region, enormously affecting the commerce of all commercial nations, but that of the United States more than any other by reason of proximity and larger trade and intercourse. At that juncture General Grant uttered these words, which now, as then, sum up the elements of the problem: \* \* \*<sup>a</sup>

“Turning to the practical aspects of a recognition of belligerency and reviewing its inconveniences and positive dangers, still further pertinent considerations appear. In the code of nations there is no such thing as a naked recognition of belligerency unaccompanied by the assumption of international neutrality. Such recognition without more will not confer upon either party to a domestic conflict a status not theretofore actually possessed or affect the relation of either party to other states. The act of recognition usually takes the form of a solemn proclamation of neutrality which recites the *de facto* condition of belligerency as its motive. It announces a domestic law of neutrality in the declaring state. It assumes the international obligations of a neutral in the presence of a public state of war. It warns all citizens and others within the jurisdiction of the proclamaunt that they violate those rigorous obligations at their own peril and can not expect to be shielded from the consequences. The right of visit and search on the seas and seizure of vessels and cargoes and contraband of war and good prize under admiralty law must under international law be admitted as a legitimate consequence of a proclamation of belligerency. While according the equal belligerent rights defined by public law to each party in our ports disfavours would be imposed on both, which while nominally equal would weigh heavily in behalf of Spain herself. Possessing a navy and controlling the ports of Cuba her maritime rights could be asserted not only for the military investment of the Island but up to the margin of our own territorial waters, and a condition of things would exist for which the Cubans within their own domain could not hope to create a parallel; while its creation through aid or sympathy from within our domain would be even more impossible than now, with the additional obligations of international neutrality we would perforce assume.

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<sup>a</sup> Here follows the passage given above, pp. 196-197.

"The enforcement of this enlarged and onerous code of neutrality would only be influential within our own jurisdiction by land and sea and applicable by our own instrumentalities. It could impart to the United States no jurisdiction between Spain and the insurgents. It would give the United States no right of intervention to enforce the conduct of the strife within the paramount authority of Spain according to the international code of war.

"For these reasons I regard the recognition of the belligerency of the Cuban insurgents as now unwise and therefore inadmissible. Should that step hereafter be deemed wise as a measure of right and duty the Executive will take it."

President McKinley, Annual Message, Dec. 6, 1897.

Referring to the foregoing passage, President McKinley, in his special message to Congress, April 11, 1898, on the relations of the United States to Spain by reason of the warfare in Cuba, said: "Nothing has since occurred to change my views in this regard; and I recognize as fully now as then that the issuance of a proclamation of neutrality, by which process the so-called recognition of belligerents is published, could, of itself and unattended by other action, accomplish nothing toward the one end for which we labor—the instant pacification of Cuba and the cessation of the misery that afflicts the island." (H. Doc. 405, 55 Cong. 2 sess. 8.)

#### 10. COLOMBIA.

##### § 68.

"A 'state of war' has not in a formal sense, either before or after the 20th of April last, been recognized by the Government of the United States as existing in the United States of Colombia, nor have the insurgents now in arms against the latter Government been recognized by the Government of the United States as belligerents, nor, so far as the Government of the United States is advised, have the insurgents in question been recognized by the United States of Colombia as belligerents."

Mr. Bayard, Sec. of State, to Mr. Garland, Attorney-General, July 1, 1885, 156 MS. Dom. Let. 151.

This letter relates to the insurrection in Colombia, which formed a subject of discussion in the case of the Ambrose Light, 25 Fed. Rep. 443. In that case the court held that the Secretary of State of the United States had given an "implied recognition" of the belligerency of the insurgents in a note addressed to the Colombian minister at Washington, April 24, 1885. A criticism of the decision of the court may be found in 33 Albany Law Journal, Feb. 13, 1886, p. 125.

With reference to the insurrection prevailing in Colombia in 1900, Mr. Hay, Secretary of State, advised the Colombian minister at Washington, August 1, 1900, that the United States had not at any time considered the status of the insurgents such as to require an examination of any possible claim on their part to belligerent rights. (For. Rel. 1900, 405.)

11. HAYTI.

§ 69.

“On the 18th day of February, 1889, neither of the parties claiming ascendency in Hayti was recognized *as a belligerent*.  
**Factional contest, 1889.** Belligerent recognition is usually effected by the President's proclamation of neutrality as between two hostile parties, and no such proclamation has been made in respect of the existing troubles in Hayti.

“No formal recognition of either of the Haytian factions *as a Government* by the Government of the United States had been made subsequent to the downfall of President Salomon and prior to the 18th of February 1889. *De facto* relations with the authorities in possession of power at Port au Prince have been kept up through the United States minister at Port au Prince and through the representative of General Legitime's Government in the United States for the necessary transaction of business.”

Mr. Blaine, Sec. of State, to the Attorney-General, Mar. 18, 1889, 172 MS. Dom. Let. 228.

This was in response to an inquiry of the Attorney-General, made in connection with the case of the “Madrid” or “Conserva,” whether “either or any of the factions contending with each other for the government in Hayti were on the 18th day of February, 1889, recognized by the Government of the United States as belligerent powers, capable of making peace or carrying on lawful war.” (The Attorney-General to the Secretary of State, March 16, 1889, MSS. Dept. of State.)

“Various documents issued from the Department of State have been put in evidence, containing certain expressions which  
**Requisite evidences of recognition.** the court is invited to examine in order to find therein an implied recognition of the faction of Legitime as representing the Government of Hayti. I do not think that in a case like this the court is required to deal with uncertain implications contained in such documents as have been here presented. The fact of public recognition of any prince, state, colony, district, or people as a belligerent is one to be made known to all men by public proclamation from the Executive or some public act by necessary implication equivalent to such a proclamation.”

Benedict, J., The Conserva, 38 Fed. Rep. 431, 437

13. BRAZIL.

§ 70.

At the beginning of September, 1893, a Brazilian squadron, consisting of the warships *Aquidaban*, *Jupiter*, and *Republica*,  
**Naval revolt, 1893.** and a number of merchant vessels which had been seized, revolted under the command of Admiral José Custodio de Mello,

and assumed control of the waters of the inner harbor of Rio de Janeiro. The Government retained Fort Santa Cruz, which commands the entrance to the harbor, and held the shore line of the inner harbor, with artillery, infantry, and police forces. The army remained loyal, and the government was supported by the Congress.<sup>a</sup>

From time to time firing took place between the loyal forts and the squadron. On October 1, however, the commanders of the English, Italian, American, Portuguese, and French naval forces at Rio de Janeiro, acting upon the concurrent advice of their diplomatic representatives, notified Admiral de Mello, who had threatened to bombard the city, that they would if necessary use force to prevent it; and the ministers at the same time requested the Government to avoid doing anything to afford a pretext for hostile action against the city.<sup>b</sup>

Mr. Thompson, United States minister at Rio de Janeiro, published a notice to American citizens that "lighters, launches, sloops, barges, and all other means of navigation used in embarking or disembarking passengers or in loading or unloading freight, should carry the flag of the United States of America at the prow in order that their traffic may be performed safely and under the protection of American war vessels."<sup>c</sup>

October 23 Admiral de Mello wrote Mr. Thompson, from on board the *Aquidaban*, that the insurgents had set up a provisional government at Desterro; which is on the island of Santa Catharina and the capital of the State of that name, and asked that they be recognized as belligerents. Mr. Thompson was instructed that such recognition "would be an unfriendly act toward Brazil, and a gratuitous demonstration of moral support to the rebellion, the insurgents having not, apparently, up to date established and maintained a political organization which would justify such recognition on the part of the United States." He was instructed "to observe, until further advised, the attitude of an indifferent spectator."<sup>d</sup>

Subsequently Mr. Thompson was instructed: "There having been no recognition by United States of the insurgents as belligerents, and there being no pretense that the port of Rio is blockaded, it is clear that if an American ship anchored in the harbor employs barges and lighters in transferring her cargo to the shore in the usual way and in so doing does not cross or otherwise interfere with Mello's line of fire and he seizes or attempts to seize the barges or lighters, he can and should be resisted. You

<sup>a</sup> For. Rel. 1893, 45-46.

<sup>b</sup> For. Rel. 1893, 51-52, 56, 66-68

<sup>c</sup> For. Rel. 1893, 53.

<sup>d</sup> Telegram, Mr. Gresham, Sec. of State, to Mr. Thompson, Oct. 25, 1893, For. Rel. 1893, 63.

will deliver or send a copy of this instruction to the commander of the insurgents." <sup>a</sup>

"While our Government recognizes the existence of war between Brazil and the insurgents, it does not accord to the latter belligerent rights. It is not claimed that the harbor at Rio is blockaded, and your right to transfer merchandise from an American or other neutral ship anchored there, to the shore, is clear, provided in doing so you do not cross the line of fire or otherwise interfere with the military operations of the insurgents. Barges and lighters thus employed will doubtless be protected by our naval forces there should Mello attempt to seize them." (Mr. Gresham, Sec. of State, to Messrs. Lanman & Kemp, Nov. 2, 1893, 194 MS. Dom. Let. 174.)

November 6, 1893, the commanders of the German, English, French, Portuguese, American, and Italian naval forces communicated to Admiral de Mello the following decision:

"1. They do not recognize the right of the insurgent forces to interfere in any way with commercial operations in the bay of Rio de Janeiro, operations which should be allowed to be accomplished everywhere except in the actual lines of fire of the batteries of the land fortifications.

"In consequence they have decided to protect merchandise, not only on board their countries' vessels or those that put themselves under their flag, but also on lighters, barges, and other means of maritime transport, whatever may be the nationality to which they belong, provided they be employed by these same ships in commercial operations.

"2. In order to avoid all disputes, these means of transportation or their tugs shall carry at their prow the flag of the country under whose protection they may be.

"3. The commanders of the foreign naval forces strongly hope that these measures will put an end to unfortunate incidents that they would find it necessary to repress." <sup>b</sup>

December 1, 1893, de Mello left Rio de Janeiro on the *Aquidaban*,

**Action of Admiral  
Benham.**

and about the 12th of the same month the command of the remaining ships of the squadron was assumed by Admiral Saldanha da Gama, who, besides intimating an intention to bombard the city, announced that he would endeavor to prevent the passage of goods to the custom house or to the shore. Although the "decision" of the 6th of November was not withdrawn, it seems that for some time da Gama was permitted to interfere with the landing of merchandise. <sup>c</sup> On the 29th of January, 1894, however, Admiral Benham, who had lately taken command of the United States naval forces, gave notice of his intention to protect all American ships proceeding to or discharging at the docks, and caused an insurgent

<sup>a</sup> Telegram, Mr. Gresham, Sec. of State, to Mr. Thompson, Nov. 1, 1893, For. Rel. 1893, 64.

<sup>b</sup> For. Rel. 1893, 95-96.

<sup>c</sup> For. Rel. 1893, 121-122.

vessel, which had fired at the boat of an American ship, to abstain from further acts of molestation, by giving evidence of his purpose to return the fire and sink her, if she persisted.<sup>a</sup> He acted within his instructions; and his action, which seems to have been approved by the other naval commanders, induced the insurgents to abstain from further interference with commerce.<sup>b</sup>

**Position of United States.** "An actual condition of hostilities existing, this Government has no desire to intervene to restrict the operations of either party at the expense of its effective conduct of systematic measures against the other. Our principal and obvious duty, apart from neutrality, is to guard against needless or illegitimate interference, by either hostile party, with the innocent and legitimate neutral interests of our citizens. Interruption of their commerce can be respected as a matter of right only when it takes one of two shapes—either by so conducting offensive and defensive operations as to make it impossible to carry on commerce in the line of regular fire, or by resort to the expedient of an announced and effective blockade.

"Vexatious interference with foreign merchant shipping at a designated anchorage, or with the lighterage of neutral goods between such anchorage and a designated landing, by random firing not necessary to a regular plan of hostilities and having no other apparent object than the molestation of such commerce, is as illegitimate as it is intolerable. Hence we have a right to expect and insist that safe anchorage and time and place for loading and unloading be designated, if practicable, to be interrupted only by notice of actual intention to bombard, or by notification and effective enforcement of blockade.

"The insurgents have not been recognized as belligerents, and should they announce a blockade of the port of Rio the sole test of its validity will be their ability to make it effective."

Mr. Gresham, Sec. of State, to Mr. Thompson, minister to Brazil, Jan. 11, 1893, For. Rel. 1893, 99.

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<sup>a</sup> "In no case have I interfered in the slightest way with the military operations of either side in the contest now going on, nor is it my intention to do so. \* \* \* American vessels must not be interfered with in any way in their movements in going to the wharves or about the harbor, it being understood, however, that they must take the consequences of getting in the line of fire where legitimate hostilities are actually in progress. \* \* \* Until belligerent rights are accorded you, you have no right to exercise any authority whatever over American ships or property of any kind. You can not search neutral vessels or seize any portion of their cargoes, even though they be within the class which may be clearly defined as contraband of war, during hostilities between two independent governments. The forcible seizure of any such articles by those under your command would be, in your present status, an act of piracy." (Admiral Benham to Admiral da Gama, January 30, 1894, For. Rel. 1893, 122.)

<sup>b</sup> For. Rel. 1893, 117, 118, 120.

Mr. Gresham, Feb. 5, 1894, cabled Mr. Thompson to inform Admiral da Gama, who had asked for the recognition of the insurgents as belligerents, that such recognition was "still considered by the President as not being justified by the situation." (For. Rel. 1893, 121.) On February 6 Mr. Thompson reported that the territorial claims of the insurgents, who professed to hold most of the States of Rio Grande do Sul, Santa Catharina and Parana, and a part of Sao Paulo, seemed to be exaggerated; that they held several towns, including the capital of Parana, in the south, but, so far as he was advised, had not absolute control of any State; and that, owing to dissensions among its members, their provisional government was not intact and was not improving either in organization or in effectiveness. (For. Rel. 1893, 126. See, also, pp. 275-278.) March 13, 1894, the insurgents at Rio unconditionally surrendered, with all their ships and munitions of war, da Gama and a number of his officers and men finding asylum on the Portuguese ships of war. (For. Rel. 1893, 141-142.)

### 13. SEMISOVEREIGN STATE AND ITS SUZERAIN.

#### § 71.

The question of belligerency as between a semisovereign state and its suzerain was discussed in the case of Madagascar.

When hostilities broke out in 1895, the relations between France and the island were regulated by the treaty between France and the Malagassy Government of Dec. 17, 1885, which was generally considered in Europe as constituting a French protectorate. The British Government treated the Malagassies not as belligerents, but as insurgents, and allowed English ships to transport materials of war for France.<sup>a</sup>

In the case of the Transvaal, however, Great Britain, though asserting rights of suzerainty, conceded to the Republic and claimed for herself belligerent rights. The Republic, in its ultimatum of Oct. 9, 1899, declared that it would regard the failure of Great Britain immediately to comply with certain demands "as a formal declaration of war." The British Government deemed these demands "impossible to discuss," and referred to the Transvaal's "declaration of war."<sup>b</sup> The existence of a state of war was notified by Great Britain to foreign governments, and rights of belligerency, on sea as well as on land, were exercised and conceded.<sup>c</sup>

<sup>a</sup> Rivier, *Principes du Droit des Gens*, I. 79-93.

<sup>b</sup> South African Republic, 1899, C.—9530, pp. 67-70.

<sup>c</sup> Correspondence respecting the action of Her Majesty's naval authorities with regard to certain foreign vessels, Africa, No. 1 (1900); Correspondence in reference to the abuse of the white flag, April, 1900, Cd. 122.

## V. ACTS FALLING SHORT OF RECOGNITION.

## 1. OF NEW STATES.

## § 72.

As there is no exclusive mode by which recognition is given, and as governments are sometimes obliged by necessity or obvious convenience to hold intercourse with communities whose independence it would not be proper to acknowledge, the question whether recognition should be predicated of a particular act may depend upon intention. Holtzendorff mentions the surrender of criminals to a new community as an act of recognition,<sup>a</sup> and it is quite conceivable that it might be so done as to create such an inference; but, as Hall justly observes,<sup>b</sup> it is not clear "why the surrender of an ordinary criminal to a *de facto* government, in the possession of regular courts, need more necessarily constitute recognition than does recognition of belligerency," both acts merely implying the acknowledgment, on grounds of political or social convenience, of a *de facto* exercise of jurisdiction. "It is, of course, direct recognition to publish an acknowledgment of the sovereignty and independence of a new power. It is direct recognition to receive its ambassadors, ministers, agents, or commissioners, officially."<sup>c</sup> The "official reception of diplomatic agents accredited by the new state, the dispatch of a minister to it, or even the grant of an exequatur to its consul, affords recognition by necessary implication."<sup>d</sup> But neither the sending out to such state of consuls, agents of commerce, or persons to obtain information, nor the reception of its representatives, if these things be done unofficially, constitutes recognition. "In 1823 consuls were appointed by Great Britain to the South American Republics and the various governments were informed that the appointments had been made for the protection of British subjects, and for the acquisition of information which might lead to the establishment of friendly relations. The various consuls took up their appointments and acted, but were not gazetted. The earliest recognition [by Great Britain] took place in 1825."<sup>e</sup>

The diplomatic agents of the United States to France were permitted to reside at Paris and to hold informal intercourse with the Government before the independence of the United States was recognized. The case was the same in the Netherlands. Arthur Lee was stopped by the Spanish Government when on his way to Madrid in the spring of 1777, but afterwards Mr. Jay was allowed to reside at Madrid, it being

<sup>a</sup> Handbuch, I. § 8.

<sup>b</sup> Int. Law, 4th ed. 93.

<sup>c</sup> Mr. Seward, Sec. of State, to Mr. Adams, May 21, 1861, Dip. Cor. 1861, 73.

<sup>d</sup> Hall, Int. Law, 93.

<sup>e</sup> Hall, Int. Law, 94.



understood that he was not "to assume a formal character, which must depend on a public acknowledgment and future treaty.<sup>a</sup> For several weeks during the summer of 1777, Arthur Lee was permitted to reside at Berlin as a private individual and to hold informal relations with Count Schulenberg, the Prussian minister of foreign affairs.<sup>b</sup> In the autumn of the same year, however, Count Schulenberg intimated that William Lee should not come to Berlin, and that no communication would be held with him if he did.<sup>c</sup> Mr. Lee then went to Vienna, but was not received there.<sup>d</sup> Mr. Dana resided at St. Petersburg for two years as a private individual; he left in August, 1783, having been unable to obtain anything beyond an informal interview with the minister for foreign affairs in the preceding April.<sup>e</sup> Mr. Izard was dissuaded by the minister of the Grand Duke at Paris from proceeding to Tuscany.

“But while this state of things continues, an entire equality of treatment of the parties is not possible. There are circumstances arising from the nature of the contest itself which produce unavoidable inequalities. Spain, for instance, is an acknowledged sovereign power, and, as such, has ministers and other accredited and privileged agents to maintain her interest and support her rights conformably to the usages of nations. The South Americans, not being acknowledged as sovereign and independent states, can not have the benefit of such officers. We consider it, however, as among the obligations of neutrality to obviate this inequality, as far as may be practicable, without taking a side, as if the question of the war was decided. We listen, therefore, to the representations of their deputies or agents, and do them justice as much as if they were formally accredited. By acknowledging the existence of a *civil war*, the right of Spain, *as understood* by herself, is no doubt affected. She is no longer recognized as the sovereign of the provinces in revolution against her. Thus far neutrality itself operates against her, and not against the other party. This also is an inequality arising from the nature of the struggle, unavoidable, and therefore not incompatible with neutrality.”

Mr. Adams, Sec. of State, to Mr. Rush, min. to England, Jan. 1, 1819, MS. Inst. to U. S. ministers, VIII. 296.

The message of President Monroe of March 8, 1822, transmitting to the House of Representatives, in response to its resolution of the 30th of the preceding January, correspondence of the agents of the United States with the Spanish-American governments and of the agents of the latter with the Secretary of State of the United States, and proposing the recognition of the independence of those governments, is printed in the Br. and For. State Papers, IX. (1821-1822) 369, and in Am. State Pap. For. Rel. IV. 818.

<sup>a</sup> Wharton, Dip. Cor. Am. Rev. I. 292; III. 515, 516.

<sup>b</sup> Id. II. 333, 335, 369.

<sup>c</sup> Id. II. 432, 458.

<sup>d</sup> Id. II. 715.

<sup>e</sup> Id. IV. 679, 696, 710; V. 209; VI. 54, 275, 392, 502, 636.

<sup>f</sup> Id. II. 455.

The State of Yucatan not having been "recognized by any act of this Government, it must still be considered as a component part of the Mexican Republic for all purposes connected with the execution of the law of the United States to which you refer. If, however, the Mexican consul at New Orleans should refuse to comply with the requirements of that law in respect to any vessel from Yucatan, your Department might, without giving just cause for complaint to his Government upon proof of that fact, take the same course as is customary in regard to vessels arriving at our ports where there is no Mexican consul, or in regard to the vessels of such nations, whether recognized by us or not, as have no consuls in the United States. The papers which accompanied your letter are now returned."

Revolution in Yucatan.

Mr. Webster, Sec. of State, to Mr. Forward, Sec. of the Treasury, Dec. 2, 1841, 32 MS. Dom. Let. 111.

Mr. Seward, in his instructions to Mr. Adams, No. 10, May 21, 1861, took, in relation to "proposed unofficial intercourse, between the British Government and the missionaries of the insurgents," the following position:

The Confederate States.

"Such intercourse would be none the less hurtful to us for being called unofficial, and it might be even more injurious, because we should have no means of knowing what points might be resolved by it. \* \* \* It is left doubtful here whether the proposed unofficial intercourse has yet actually begun. You will, in any event, desist from all intercourse whatever, unofficial as well as official, with the British Government, so long as it shall continue intercourse of either kind with the domestic enemies of this country."<sup>a</sup>

Mr. Adams, who was directed not to read or exhibit his instructions to the British secretary of state, but to disclose the positions taken in them as occasion might require, observed, in an interview with Earl Russell, June 12, 1861, that the continued stay of the Confederate commissioners in London, "and still more the knowledge that they had been admitted to more or less interviews with his lordship, was calculated to excite uneasiness," and that it had in fact already given great dissatisfaction to his Government. Mr. Adams continues his report of the interview as follows: "I added, as moderately as I could, that in all frankness any further protraction of this relation could scarcely fail to be viewed by us as hostile in spirit, and to require some corresponding action accordingly."

"His lordship then reviewed the course of Great Britain. He explained the mode in which they had consulted with France, prior to

<sup>a</sup> Dip. Cor. 1861, 72. See, as to the refusal of the United States, in July, 1891, to receive representatives of the Congressionalists in Chile who had not been recognized as belligerents, For. Rel. 1891, 146, 317.

any action at all, as to the reception of the deputation from the so-called Confederate States. It had been the custom both in France and here to receive such persons unofficially for a long time back. Poles, Hungarians, Italians, etc., etc., had been allowed interviews to hear what they had to say. But this did not imply recognition in their case any more than in ours. He added that he had seen the gentlemen once some time ago, and once more some time since; he had no expectation of seeing them any more. \* \* \*

"I shall continue my relations here until I discover some action apparently in conflict with it, or receive specific orders from the Department dictating an opposite course."<sup>a</sup>

In a note to Mr. Adams, November 26, 1861, Earl Russell said:

"Her Majesty's Government hold it to be an undoubted principle of international law, that when the persons or the property of the subjects or citizens of a state are injured by a *de facto* government, the state so aggrieved has a right to claim from the *de facto* government redress and reparation; and also that in cases of apprehended losses or injury to their subjects states may lawfully enter into communication with *de facto* governments to provide for the temporary security of the persons and property of their subjects. \* \* \*

"It may be necessary in future, for the protection of the interests of Her Majesty's subjects in the vast extent of country which resists the authority of the United States, to have further communications both with the central authority at Richmond and with the governors of the separate States, and in such cases such communications will continue to be made, but such communications will not imply any acknowledgment of the Confederates as an independent state."<sup>b</sup>

In a despatch to Mr. Seward, September 13, 1862, Mr. Dayton, United States minister at Paris, adverts to the frequent references in the press to conferences between Mr. Slidell, as diplomatic agent of the Confederate States, and M. Thouvenel, French minister of foreign affairs. Mr. Dayton, in conversation with M. Thouvenel, asked that "if any propositions or suggestions had come or should come, from any source, affecting the interests of the United States, and which should be entertained or considered by the French Government," he might be advised of them. M. Thouvenel, says Mr. Dayton, "immediately said that he had seen Mr. Slidell once, when he arrived in Paris, about which we knew everything; that afterwards, about the time that Mr. Mason last applied to Earl Russell, and for a like purpose, Mr. Slidell applied to him; that these were the only occasions upon which he had seen Mr. Slidell, and he much doubted if the latter felt greatly flattered by his reception."<sup>c</sup>

<sup>a</sup> Mr. Adams to Mr. Seward, June 14, 1861, Dip. Cor. 1861, 87, 88; "Messrs. Yancey, Rost, and Mann were not again received at the foreign office." (Adams, Life of Charles Francis Adams, 198.)

<sup>b</sup> Dip. Cor. 1862, 8-9.

<sup>c</sup> Dip. Cor. 1862, 389.

Mr. Seward continued to affirm that the informal reception of Confederate emissaries by the officials of foreign governments was improper; but, while he governed his own conduct, so far as unofficial missions from other countries were concerned, by the principle which he advocated, he left untried the policy of retaliatory nonintercourse proposed in his instruction No. 10 to Mr. Adams. Writing to Mr. Bigelow, then United States minister to France, March 13, 1865, Mr. Seward narrated his refusal to admit to an "informal interview" an agent of Maximilian, on the ground that it was the "settled position" of the United States "to hold no interview, public or private, with persons coming from any country other than the agents duly accredited by the authority of that country which is recognized by this Government;" and he added, "This Government has insisted that the opposite position, which to some extent is held in other states, and under which Mason, Slidell, and Mann, insurgent emissaries from this country, are admitted to unofficial conferences, is unfriendly and injurious to the United States. Thus we govern ourselves in our intercourse with other states by the principles that we claim ought to govern them in their relations with the United States."<sup>a</sup>

In 1863 Mr. Davis sent to the Pope, through Mr. A. Dudley Mann, who was a member of the commission sent abroad to secure the recognition of the Confederate States by European powers, a letter of thanks for the feeling shown by His Holiness in certain open communications to the archbishops of New York and New Orleans, urging all possible efforts toward the restoration of peace. Mr. Mann was instructed to take the letter to Rome, and to that end was commissioned as a special envoy to the Holy See. He reached Rome November 9, 1863, and obtaining, through the Papal Secretary of State, Cardinal Antonelli,

**Letter of His Holiness the Pope.**

<sup>a</sup>Dip. Cor. 1865, part 3, p. 378. See also H. Ex. Doc. 20, 39 Cong. 1 sess.; Dana's Wheaton, note 41, § 76, p. 131; Mr. Blaine, Sec. of State, to Mr. Fish, April 5, 1881, MS. Inst., Switzerland, holding that the recognition of a person as a "political agent" of Switzerland did not invest him with a diplomatic character. Wharton, Int. Law Digest, I. 514, referring to Mr. Seward's position, says: "But when a belligerent is recognized as such, this implies an intercourse, at least between agents, in reference to terms of belligerency. This intercourse may be very informal, and, when between belligerents who are parties to a civil war, may for a time be limited to negotiations for exchange of prisoners and for cognate objects. But, as in the case of the late civil war in the United States, the sovereign against whom the insurrection is directed, will, from the necessity of the case, hear informally and unofficially agents from belligerent insurgents as to terms of surrender." In his Diplomatic Correspondence of the American Revolution, II. 370, the same eminent author, in discussing the attitude of Frederick the Great toward the mission of Arthur Lee to Berlin in 1777, goes further and takes the ground that insurgents who have been recognized as belligerents are "entitled to have agents" near the governments by which they have been so recognized.

an interview with the Pope, read him the letter. His Holiness promised to write a reply "of such a character that it may be published for general perusal." The reply, translated from the Latin, is as follows:

"Illustrious and honorable sir, greeting: We have received with fitting kindness the gentleman sent by Your Excellency to deliver us your letters, bearing date the 23d of September last. We experienced indeed no small pleasure when we learned from the same gentleman and the letters of Your Excellency with what emotion of joy and gratitude toward us you were affected, illustrious and honorable sir, when you were first made acquainted with our letters to those reverend brethren, John, Archbishop of New York, and John, Archbishop of New Orleans, written on the 18th of October of last year, in which we again and again urged and exhorted the same reverend brethren that, as behooved their distinguished piety and their episcopal charge, they should most zealously use every effort, in our name also, to bring to an end the fatal civil war that had arisen in those regions, and that those people of America might attain mutual peace and concord and be united in mutual charity. And very grateful it was to us, illustrious and honorable sir, to perceive that you and those people were animated with the same feeling of peace and tranquillity which we so earnestly inculcated in the letters mentioned as having been addressed to the aforesaid reverend brethren. And would that other people also of those regions and their rulers, seriously considering how grievous and mournful a thing is intestine war, would be pleased, with tranquil minds, to embrace and enter upon counsels of peace. We indeed shall not cease with most fervent prayers to beseech and pray God, the Omnipotent and All-good, to pour out the spirit of Christian charity and peace upon all those people of America, and deliver them from the evils so great with which they are afflicted.

"And of the most merciful Lord of Compassion Himself we likewise pray that He may illumine your excellency with the light of His grace, and may conjoin you in perfect love to ourself.

"Given at Rome, at St. Peter's, December 3, in the year 1863, and of our pontificate the eighteenth.

"PIUS PP. IX."

See an article entitled "Relics of the Confederacy in Washington," by Mr. G. M. Jacobs, in the *Louisville Courier-Journal*, May 30, 1900. The original letter is in the miscellaneous division of the Treasury Department. Mr. Jacobs, in the article in question, says: "Mr. Mann accepted the letter as a positive recognition of the Confederate government, and immediately telegraphed congratulations to Judah P. Benjamin, secretary of state. In transmitting the document to President Davis, he wrote: 'This letter will grace the archives of the executive office in all coming time. It will live, too, forever in story as the production of the first potentate who formally recognized your official position and accorded to one of the diplomatic representatives of the Confederate States an audience in an established court palace like that of St. James or the Tuileries.'"

"Years later, Mr. Mann wrote: 'Even after this lapse of time I can not help but think how majestic was the conduct of the Government of the pontifical States in its bearing toward me when contrasted with the sneaking subterfuges to which the other European governments had recourse in order to evade intercourse with our commissioners.'

"How many of the other leaders of the Confederacy interpreted the Pope's letter in the same way is not definitely known. Mr. Davis left no official statement of his opinion on the subject. Mr. Benjamin, however, in a communication to Mr. Mann, maintained that as a recognition of the Confederate States the letter was of little value, being only an inferential recognition, unconnected with political action or the regular establishment of diplomatic relations, and that his address to Mr. Davis as president of the Confederate States was merely a formula of courtesy to his correspondent, and not a political acknowledgment of the fact."

That Mr. Benjamin's interpretation of the letter was correct is shown by statements made by Cardinal Antonelli to Mr. King, minister of the United States to the papal States, by which it appears that the action of his holiness was free from all political design, and was intended merely as an expression of his wishes for the restoration of peace to the people of the United States. (Mr. King to Mr. Seward, Sec. of State, Jan. 3, Jan. 15, March 19, 1863, MSS. Dept. of State; Mr. Seward, Sec. of State, to Mr. King, Feb. 9 and April 6, 1863, MS. Inst. Papal States, I. 69, 72.)

The South African Republic, though classed as a semi-sovereign state,<sup>a</sup> maintained diplomatic relations. Great Britain, the suzerain power, had at Pretoria a diplomatic agent,<sup>b</sup> a title sometimes given to representatives to semi-sovereign states; and Portugal a *chargé d'affaires*. The Republic, on the other hand, sent to Europe in 1898 Dr. W. J. Leyds, who was accredited as envoy extraordinary and minister plenipotentiary to various courts, and who was so received at Paris and The Hague, where he had permanent offices.<sup>c</sup>

The relations thus maintained were, it is needless to say, conducted impliedly if not expressly under the limitations of the London convention of 1884, by which all treaties concluded by the Republic, except with the Orange Free State, were subject to the veto of Great Britain. By its ultimatum and declaration of war of October 9, 1899, however, the Republic impliedly declared itself independent, saying that it considered the presence of the British military force near its borders "as a threat against the independence of the South African Republic."<sup>d</sup> The idea of entire independence was afterwards more clearly expressed by the Presidents of the South African Republic and the Orange Free State, who, in their message to Lord Salisbury, of March 5, 1900, declared that the war was "undertaken solely as a defensive measure

<sup>a</sup> Rivier, *Principes du Droit des Gens*, I. 84; supra, p. 28.

<sup>b</sup> The Statesman's Year Book, 1899, p. 1003.

<sup>c</sup> Almanach de Gotha, 1900, pp. 793, 990.

<sup>d</sup> Blue Book, South African Republic, October, 1899, C.—9530.

to safeguard the threatened independence of the South African Republic;" that it was "only continued in order to secure and safeguard the incontestable independence of both Republics as sovereign international states," and to assure immunity to British subjects who had taken part with them in the war; and that "on these conditions, but on these conditions alone," were they "desirous of seeing peace reestablished in South Africa."<sup>a</sup>

In furtherance of the cause thus defined, certain delegates were sent abroad, for the purpose, as it was understood, of seeking both recognition and intervention. In Europe, prior to their coming to the United States, they were received at The Hague, first by the minister of foreign affairs and then by the Queen. They arrived in Washington, May 12, 1900. On the 21st of the month the Department of State gave out a statement, the first paragraph of which reads as follows:

"Messrs. A. Fischer, C. H. Wessels, and A. D. W. Wolmarans, the delegates in this country of the South African Republics, called to-day by appointment at the State Department. They were cordially received, and remained with the Secretary of State for more than an hour. They laid before the Secretary at much length and with great energy and eloquence the merits of the controversy in South Africa and the desire of the Boer Republics that the United States should intervene in the interest of peace and use its influence to that end with the British Government."<sup>b</sup>

On the following morning the delegates were received by President McKinley at the Executive Mansion, the President's secretary being the only other person present at the interview. It was afterwards announced by the press that the President had confirmed the views set forth in the reply of the Secretary of State.

When the delegates arrived in Washington an announcement was made in their behalf through the press that they bore credentials as envoys extraordinary and ministers plenipotentiary from the Boer Republics, and the inscriptions on their cards so indicated. Their credentials, however, were not presented, and their reception by the President and the Secretary of State was altogether personal and unofficial. They afterwards travelled extensively in the United States

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<sup>a</sup> Africa, No. 2 (1900). Lord Salisbury, in his acknowledgment of the message, March 11, 1900, quoted the phrases "incontestable independence" and "sovereign international states" as the text of his reply.

<sup>b</sup> The statement then sets forth the reply of Mr. Hay, Secretary of State, which is given in full under the head of Mediation.

<sup>c</sup> May 23, 1900, the delegates were entertained by Mr. Hay, personally and unofficially, at luncheon, it being his desire, as intimated in the public prints, to show appreciation of the courtesies of the Boer people to his son, Mr. Adelbert Hay, United States consul at Pretoria.

The delegates at no time offered to present their credentials, nor was the subject in any way referred to. (Mr. Hay, Secretary of State, to Mr. Breen, Nov. 2, 1901, 248 MS. Dom. Let. 613.)

and held public meetings, appealing to public opinion and invoking aid for their cause.<sup>a</sup>

On May 21, 1900, the Senate by a vote of 36 to 21 adopted a motion to lay on the table a resolution to extend the privileges of the floor to the delegates as commissioners of the South African Republics. On the 29th of May the same body, by a vote of 40 to 26, decided to refer to the Committee on Foreign Relations a resolution of sympathy with those Republics.<sup>b</sup>

“As a crisis is approaching which must produce great changes in the situation of Spanish America, and may dissolve altogether its colonial relations to Europe, and as the geographical position of the United States, and other obvious considerations, give them an intimate interest in whatever may affect the destiny of that part of the American continent, it is our duty to turn our attention to this important subject, and to take such steps, not incompatible with the neutral character and honest policy of the United States, as the occasion renders proper. With this view you have been selected to proceed, without delay, to Buenos Ayres. You will make it your object, wherever it may be proper, to diffuse the impression that the United States cherish the sincerest good will towards the people of Spanish America as neighbors, as belonging to the same portion of the globe, and as having a mutual interest in cultivating friendly intercourse; that this disposition will exist, whatever may be their internal system or European relation, with respect to which no interference of any sort is pretended, and that, in the event of a separation from the parent country, and of the establishment of an independent system of national government, it will coincide with the sentiments and policy of the United States to promote the most friendly relations, and the most liberal intercourse, between the inhabitants of this hemisphere, as having all a common interest, and as lying under a common obligation to maintain that system of peace, justice and good will, which is the only source of happiness for nations.

“Whilst you inculcate these as the principles and dispositions of the United States, it will be no less proper to ascertain those on the

<sup>a</sup> “Messrs. Wessels and Wolmarans to-day visited Mr. Roosevelt in order to pay their respects to him and to bid him farewell.

“In an interview to-day the Boer delegates said that they desired particularly to make it known that they neither asked, desired, nor expected intervention from any country. What they wanted, and what they had laid before the American Government, was a request that civilized warfare might be assured in South Africa. They had not suggested any plan for assuring it. . . . They declared, in conclusion, that Mr. Kruger was not seeking intervention in Europe.” (London Times, weekly, March 14, 1902, p. 162, col. 4.)

<sup>b</sup> See, as to the request of the South African Republics for the intervention of the United States, and the communication of the request to the British Government, S. Doc. 222, 56 Cong. 1 sess. See, also, S. Doc. 113, 56 Cong. 1 sess.; H. Doc. 618, 56 Cong. 1 sess.



other side, not only towards the United States, but in reference to the great nations of Europe, and to the commercial and other connections with them, respectively; and, generally, to inquire into the state, the characteristics, and the proportions, as to numbers, intelligence, and wealth of the several parties, the amount of population, the extent and organization of the military force, and the pecuniary resources of the country.

“The real as well as ostensible object of your mission is to explain the mutual advantages of commerce with the United States, to promote liberal and *stable* regulations, and to transmit seasonable information on the subject. In order that you may render the more service in this respect, and that you may, at the same time, enjoy the greater protection and respectability, you will be furnished with a credential letter, such as is held by sundry agents of the United States in the West Indies, and as was lately held by one at the Havana, and under the sanction of which you will give the requisite attention to commercial objects.”

Mr. Monroe, Sec. of State, to Mr. Joel Poinsett, agent to Buenos Ayres, June 28, 1810, H. Rep. 72, 20 Cong. 2 sess.; Br. and For. State Papers (1812-1814), II. 1219.

May 14, 1812, a copy of these instructions was communicated to Mr. Alexander Scott, who was sent as agent to Caracas. Mr. Scott was also advised that the fact that the Venezuelan provinces had declared their independence formed an essential difference between their situation and that of the other Spanish provinces in America, but that until their independence was “more formally acknowledged by the United States” it could not materially affect his duties. His credentials were the same as those of Mr. Poinsett. He was to inquire particularly as to the disposition and ability of the Venezuelan people to maintain their independence. “Nothing would be more absurd,” declared his instructions, “than for the United States to acknowledge their independence, in form, until it was evident that the people themselves were resolved and able to support it.” Meanwhile a friendly communication was to be preserved; and the ministers of the United States at London, Paris, and St. Petersburg had been instructed to make known to those courts that their Government took an interest in the independence of the Spanish provinces. (See, for the full text of the instructions, which are signed by Mr. Monroe, as Secretary of State, May 14, 1812, Br. and For. State Papers (1812-1814), II. 1220-1222.)

Instructions similar to those given to Mr. Poinsett and Mr. Scott, were given by Mr. Clay, as Secretary of State, Sept. 6, 1825, to Mr. William C. Somerville, as agent to Greece. (MS. Inst. Special Missions, I. 31.)

“Mr. Michael Hogan was appointed agent for commerce and seamen of the United States at Valparaiso on the 11th Nov., 1820, and till the arrival of Mr. Allen [the first minister of the United States to Chile, appointed Jan. 27, 1823] he performed the duties generally appertaining to a diplomatic agency on the part of this Government, in Chile, from the necessity of the case, but without any special authority or instructions to that effect. \* \* \* In the cases of Mr. John B. Prevost, Wm. Tudor, John M. Forbes, and others, who received the same appointments as Michael Hogan, as agents of commerce and seamen, before regular diplomatic intercourse was established between the United States and the South American states,

these gentlemen received salaries from two thousand to four thousand five hundred dollars per annum each." (Mr. Livingston, Sec. of State, to Mr. Wayne, Feb. 25, 1833, 25 MS. Dom. Let. 258.)

"In 1823 consuls were appointed by Great Britain to the South American republics, and the various governments were informed that the appointments had been made for the protection of British subjects and for the acquisition of information which might lead to the establishment of friendly relations. The various consuls took up their appointments and acted, but were not gazetted. The earliest recognition [by Great Britain] took place in 1825." (Hall, *Int. Law*, 94.)

In 1816, when the acknowledgment of the independence of the South American colonies was under consideration, Mr. Monroe sent three commissioners, Caesar A. Rodney, Theoderick Bland, and John Graham, in a ship-of-war, to visit the several colonies, inquire into the condition of things in respect to the probability of endurance of successful hostilities, and then report. These commissioners were not nominated to the Senate, though that body was in session when they sailed, but went exclusively on the President's nomination. Their expenses were not paid out of the contingent fund, but were met by a subsequent appropriation of \$30,000 by Congress.

Schouler, *Hist. of the United States*, III. 28; President Monroe's First Annual Message, 1817; Mr. Adams, Sec. of State, to Mr. Hyde de Neuville, July 27, 1818, MS. Notes, For. Leg.; Am. State Papers, For. Rel. IV. 217-323.

"Your letter of the 3d. instant has been submitted to the consideration of the President of the United States, by whose

**Hayti.**

direction I have the honor of stating that the measure solicited in the memorial to which you refer cannot be adopted in the manner proposed, on the part of the Executive Administration without inconvenience to the public interest. 'Letters of Credence to the authorities of the Island of Hayti, with the address now many years assumed by them,' you are aware would be an explicit acknowledgment of those authorities, and if the example of the British Government formed a rule of authority for that of the United States, it is believed that no such letters of Credence have ever been issued by them.

"It is truly stated by the memorialists that at two different periods during the Life of Christophe, agents were dispatched by the Government of the United States, with a view to obtain justice, and if possible, indemnity for these injuries, but without success. A special agent was also sent after the fall of Christophe, to claim indemnity from the present existing rulers of the island, but with no more favorable result. A copy of the Instructions to this agent, so far as they relate to the claim of the Memorialists is herewith enclosed, together with his report of the execution of his agency, and the papers accompanying the same, which I request you to have the goodness after perusal to return to this Department. The President is however willing to order Commodore Porter to Hayti, and to instruct him to obtain an interview with the Chief of the Island or with his Secretary of State, and to urge the

payment of such sum, as will make adequate indemnity to our citizens for the property which was unjustly taken from them by that Government under the sway of Christophe. The Commodore may take with him a suitable person, possessing the confidence of the parties interested, and who in case the indemnity is not promptly made, may be authorized by him, to pursue the claims in his absence. The Commodore will in such event, be instructed to present such person to the Chief of the Island, or other proper authority, with an intimation that he will be left there for the purpose specified.

“It is also suggested by the President that if it should suit the views of the claimants, the present commercial agent of the United States at Port au Prince may be instructed to present their claims again to the consideration of the President Boyer.”

Mr. Adams, Sec. of State, to Messrs. Samuel Smith and James Lloyd U. S. Senate, Feb. 24, 1824, 20 MS. Dom. Let. 300. The papers referred to in the foregoing letter were: 1. Copy of instructions to the agent, being an extract of a letter from Mr. Adams to Mr. Edw. Wyer, Jan. 30, 1821; 2. Mr. E. Wyer to Mr. Adams, April 10, 1821; 3. *Extrait des Archives publiques*, 2 papers, A. & B.; 4. Mr. Boyer to Mr. Wyer (C) March 17, 1821; 5. Same to same, same date; 6. Petition of J. B. Davis and others. See Adams' Memoirs, VI. 12; Br. & For. State Papers, 1812-1814, II. 1053, 1060, 1065.

Hayti was not recognized till 1862.

In February, 1845, the President sent a commissioner or special agent to Santo Domingo to inquire concerning its political condition. A special agent was again sent to the island in 1851 to act with representatives of France and Great Britain in an effort to bring about a peace between Hayti and the Dominican Republic. The latter Government was not recognized till 1866.

June 10, 1845, Mr. Edward A. Hopkins was appointed special agent to Paraguay to cultivate friendly relations with the country and obtain “the information necessary to enable the President and Congress to decide whether its independence ought to be recognized by the United States.” He “was not furnished with any letter of credence to the minister for foreign affairs of Paraguay, nor with any power whatever, to negotiate or act in a diplomatic character.” March 30, 1846, he was “peremptorily recalled,” on its being discovered that he had “violated his instructions by representing himself to the President of Paraguay as invested with a diplomatic character, by committing the President and Congress of the United States to him in favor of recognizing the independence of that country, and by offering the mediation of the United States between the Government of Paraguay and Buenos Ayres.”

Mr. Buchanan, Sec. of State, to Gen. Alvear, Aug. 14, 1846, MS. notes, Argentine Leg. VI. 19.

June 18, 1849, Mr. Clayton, as Secretary of State, issued to Mr. A. Dudley Mann, who was then in Europe, instructions in relation to a mission which he was desired to undertake as a special and confidential agent to Hungary.

The "principal object" of his mission, said the instructions, was "to obtain minute and reliable information in regard to Hungary, in connection with the affairs of adjoining countries, the probable issue of the present revolutionary movements, and the chances we may have of forming commercial arrangements with that power, favorable to the United States." In the "desperate conflict" between Austria and Hungary, Russia had "chosen to assume an attitude of interference." If it should appear that Hungary was "able to maintain" the independence which she had declared, the United States desired "to be the very first to congratulate her, and to hail, with a hearty welcome, her entrance into the family of nations." The prospect, however, seemed to be "a gloomy one;" and Mr. Mann was authorized, if he also should think this to be the case, to suspend his operations and even to omit to visit Hungary. The "delicate and important duties" with which he was charged were left, it was said, "almost wholly" to his own "discretion and prudence." He was to decide upon his own "movements and places of destination," the "particular points" as to which he would make inquiries, the "proper mode of approaching M. Kossuth and his confidential advisers," and the "communications" which he might "deem it proper" to make to them, on the part of his Government. Future instructions would to a great extent depend upon his reports. Meanwhile, he was furnished with "a sealed letter," introducing him, in his "official character," to the "minister of foreign affairs of Hungary," and with an "open copy," which he was to deliver or to withhold, as circumstances might cause him to think "proper and expedient." In conclusion, the instructions said: "You will furnish the Department with a copy of the new constitution, if any shall have been formed, of Hungary, and acquaint us with its operation; and whether any, and what other nations shall have recognized the independence of Hungary, or intend to do so. Should the new government prove to be, in your opinion, firm and stable, the President will cheerfully recommend to Congress, at their next session, the recognition of Hungary; and you might intimate, if you should see fit, that the President would, in that event, be gratified to receive a diplomatic agent from Hungary in the United States, by or before the next meeting of Congress; and that he entertains no doubt whatever that, in case her government should prove to be firm and stable, her independence would be speedily recognized by that enlightened body."

Accompanying the instructions there was a full power authorizing Mr. Mann, as "special and confidential agent of the United States to Hungary," to negotiate and conclude, with any person "duly authorized by the Hungarian Government," a commercial convention. The "sealed letter" to which the instructions refer was addressed to "His Excellency the Minister for Foreign Affairs of Hungary." It introduced Mr. Mann as "special and confidential agent of the United States to the Government of Hungary," and asked for him "a reception and treatment corresponding to his station and to the purposes for which he is sent."

In the course of his instructions to Mr. Mann, Mr. Clayton observed that the "anxiety" which had been felt in the United States as to the fate of the Hungarian revolution, especially since the intervention of Russia, was "by no means inconsistent with the well-known and long-established policy of noninterference in the domestic concerns of other nations which has ever animated and governed the councils and conduct of the American Government." The United States desired, if it should appear that Hungary was "able to maintain the independence she has declared," to be "the very first to congratulate her, and to hail with a hearty welcome her entrance into the family of nations." The "best wishes" of the United States, said Mr. Clayton, attended her. A policy of "immobility, backed by the bayonet," had opposed the efforts of the "illustrious man," Kossuth, to effect reforms and ameliorate the condition of his countrymen. To the contemplation of American statesmen, Hungary offered "the interesting spectacle of a great people rising superior to the enormous oppression" that had "so long weighed her down." "She is now described to us," continued Mr. Clayton, "by those who profess to understand her position, as the representative of republicanism and of liberal principles. Her geographical extent and situation, and her population, productions, and mineral wealth, constitute resources whose development would speedily follow her successful struggle for independence. In this case new commercial prospects would be unfolded, and the port of Fiume, in the Adriatic, her only seaport, would become unlocked, and opened to admit the navigation and staples of the United States." The President therefore wished "to obtain information in regard to Hungary, and her resources and prospects, with a view to an early recognition of her independence, and the formation of commercial relations with her."<sup>a</sup>

Mr. Mann proceeded to Vienna, but when he arrived there the revolution was practically ended, and he did not visit Hungary.<sup>b</sup>

<sup>a</sup> S. Ex. Doc. 43, 31 Cong. 1 Sess.; Br. and For. State Papers, XXXVIII. (1849-50), 260-264.

<sup>b</sup> Political Science Quarterly, X. 264

“During the late conflict between Austria and Hungary, there seemed to be a prospect that the latter might become an independent nation. However faint that prospect at the time appeared, I thought it my duty, in accordance with the general sentiment of the American people, who deeply sympathized with the Magyar patriots, to stand prepared, upon the contingency of the establishment by her of a permanent government, to be the first to welcome independent Hungary into the family of nations. For this purpose, I invested an agent, then in Europe, with power to declare our willingness promptly to recognize her independence in the event of her ability to sustain it. The powerful intervention of Russia in the contest extinguished the hopes of the struggling Magyars. The United States did not, at any time, interfere in the contest; but the feelings of the nation were strongly enlisted in the cause, and by the sufferings of a brave people, who had made a gallant though unsuccessful effort to be free.”

President Taylor's First Annual Message, 1849.

Mr. Abdy, in his edition of Kent (1878), 92, while approving the course of the United States in regard to the recognition of the independence of the Spanish-American States and of Texas, makes, of the passage above quoted, the following criticism:

‘Is it necessary to criticise a document in which two faults are at all events visible, the delegacy of sovereign powers to an agent, and its victory of sympathy and sentiment over reason and law. What would have been thought of an English minister who should have directed an agent in the Confederate States to declare the willingness of England promptly to recognize their independence, in the event of their ability to maintain it?’

See, also, Lawrence, *Com. sur les Éléments du Droit Int.* I. 201.

With a special message of March 28, 1850, President Taylor communicated to the Senate, in response to a resolution of that body, the text of Mr. Mann's instructions.<sup>a</sup> In his message President Taylor said: “My purpose, as freely avowed in this correspondence, was to have acknowledged the independence of Hungary, had she succeeded in establishing a government *de facto* on a basis sufficiently permanent in its character to have justified me in doing so, according to the usages and settled principles of this Government.” Such being the President's design, the mission of Mr. Mann seems to have derived its exceptional character not so much from what it was intended ultimately to accomplish, as from the circumstances in which it was conceived and the manner in which it was to be executed. As Mr. Mann was authorized, in case he should find a Hungarian government in existence and should think it firm and stable, not only to present himself to it in an “official character,” but also to pledge the President to receive from it a diplomatic agent, he was invested with discretionary powers as to the

Publication of Mr.  
Mann's instructions.

<sup>a</sup> Sen. Ex. Doc. 43, 31 Cong. 1 sess.

recognition of a new state such as never were confided, it is believed, to any other foreign agent of the United States."

After the publication of Mr. Mann's instructions, the Chevalier Hülsemann, Austrian chargé d'affaires at Washington, **Mr. Hülsemann's protest.** was directed to enter a formal protest. When this protest was presented President Taylor was dead, and a reply was made by Mr. Webster, who had succeeded Mr. Clayton as Secretary of State.

"The undersigned, chargé d'affaires of His Majesty the Emperor of Austria, has been instructed to make the following communication to the Secretary of State.

"As soon as the Imperial Government became aware of the fact that a United States agent had been despatched to Vienna, with orders to watch for a favorable moment to recognize the Hungarian Republic, and to conclude a treaty of commerce with the same, the undersigned was directed to address some confidential but pressing representations to the Cabinet of Washington against that proceeding, which is so much at variance with those principles of international law, so scrupulously adhered to by Austria, at all times and under all circumstances, towards the United States. In fact, how is it possible to reconcile such a mission with the principle of nonintervention, so formally announced by the United States as the basis of American policy, and which had just been sanctioned with so much solemnity by the President, in his inaugural address of March 5, 1849? Was it in return for the friendship and confidence which Austria had never ceased to manifest towards them, that the United States became so impatient for the downfall of the Austrian monarchy, and even sought to accelerate that event by the utterance of their wishes to that effect? Those who did not hesitate to assume the responsibility of sending Mr. Dudley Mann on such an errand, should, independent of considerations of propriety, have borne in mind that they were exposing their emissary to be treated as a spy. It is to be regretted that the American Government was not better informed as to the actual resources of Austria, and her historical perseverance in defending her just rights. A knowledge of those resources would have led to the conclusion that a contest of a few months' duration could neither have exhausted the energies of that power, nor turned aside its purpose to put down the insurrection. Austria struggled against the French Revolution for twenty-five years; the courage and perseverance which she exhibited in that memorable contest have been appreciated by the whole world.

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<sup>a</sup> No record exists in the Department of State of the sending of an agent to Vienna to investigate the acts of certain Venetian conspirators, among whom was Daniel Manin, and of Consul-General Sparks, during the revolution of 1848-49. (Dept. of State to Mr. Hetzler, Feb. 10, 1897, 215 MS. Dom. Let. 637.)

“To the urgent representations of the undersigned, Mr. Clayton answered that Mr. Mann’s mission had no other object in view than to obtain reliable information as to the true state of affairs in Hungary, by personal observation. This explanation can hardly be admitted, for it says very little as to the cause of the anxiety which was felt to ascertain the chances of the revolutionists. Unfortunately, the language in which Mr. Mann’s instructions were drawn gives us a very correct idea of their scope. This language was offensive to the imperial cabinet, for it designates the Austrian Government as an *iron rule*, and represents the rebel chief, Kossuth, as an illustrious man; while improper expressions are introduced in regard to Russia, the intimate and faithful ally of Austria. Notwithstanding these hostile demonstrations, the imperial cabinet has deemed it proper to preserve a conciliatory deportment, making ample allowance for the ignorance of the Cabinet of Washington on the subject of Hungarian affairs, and its disposition to give credence to the mendacious rumors which are propagated by the American press. This extremely painful incident, therefore, might have been passed over without any written evidence being left, on our part, in the archives of the United States, had not General Taylor thought proper to revive the whole subject by communicating to the Senate, in his message of the 18th of last March, the instructions with which Mr. Mann had been furnished on the occasion of his mission to Vienna. The publicity which has been given to that document has placed the Imperial Government under the necessity of entering a formal protest, through its official representative, against the proceedings of the American Government, lest that Government should construe our silence into approbation, or toleration even, of the principles which appear to have guided its action and the means it has adopted.

“In view of all these circumstances, the undersigned has been instructed to declare that the Imperial Government totally disapproves, and will always continue to disapprove, of those proceedings, so offensive to the laws of propriety; and that it protests against all interference in the internal affairs of its Government. Having thus fulfilled his duty, the undersigned considers it a fortunate circumstance that he has it in his power to assure the Secretary of State that the Imperial Government is disposed to cultivate relations of friendship and good understanding with the United States, relations which may have been momentarily weakened, but which could not again be seriously disturbed without placing the cardinal interests of the two countries in jeopardy.

“The instructions for addressing this communication to Mr. Clayton reached Washington at the time of General Taylor’s death. In compliance with the requisitions of propriety, the undersigned deemed it his duty to defer the task until the new administration had been



completely organized; a delay which he now rejoices at, as it has given him the opportunity of ascertaining from the new President himself, on the occasion of the reception of the diplomatic corps, that the fundamental policy of the United States, so frequently proclaimed, would guide the relations of the American Government with the other powers. Even if the Government of the United States were to think it proper to take an indirect part in the political movements of Europe, American policy would be exposed to acts of retaliation, and to certain inconveniences, which could not fail to affect the commerce and the industry of the two hemispheres. All countries are obliged, at some period or other, to struggle against internal difficulties; all forms of government are exposed to such disagreeable episodes; the United States have had some experience in this very recently. Civil war is a possible occurrence everywhere, and the encouragement which is given to the spirit of insurrection and of disorder most frequently falls back upon those who seek to aid in its development, in spite of justice and wise policy."

Chevalier Hülsemann to Mr. Webster, Sept. 30, 1850, S. Ex. Doc. 9, 31 Cong. 2 sess.; Webster's Works, VI. 488; Br. & For. State Papers, XXXVIII. 271.

"The undersigned, Secretary of State of the United States, had the honor to receive some time ago the note of Mr. Hülsemann, chargé d'affaires of His Majesty the Emperor of Austria, of the 30th September. Causes not arising from any want of personal regard for Mr. Hülsemann or of proper respect for his Government have delayed an answer until the present moment. Having submitted Mr. Hülsemann's letter to the President, the undersigned is now directed by him to return the following reply:

"The objects of Mr. Hülsemann's note are, first, to protest, by order of his Government, against the steps taken by the late President of the United States to ascertain the progress and probable result of the revolutionary movements in Hungary; and, secondly, to complain of some expressions in the instructions of the late Secretary of State to Mr. A. Dudley Mann, a confidential agent of the United States, as communicated by President Taylor to the Senate on the 28th of March last.

"The principal ground of protest is founded on the idea or in the allegation that the Government of the United States, by the mission of Mr. Mann and his instructions, has interfered in the domestic affairs of Austria in a manner unjust or disrespectful toward that power. The President's message was a communication made by him to the Senate, transmitting a correspondence between the Executive Government and a confidential agent of its own. This would seem to be itself a domestic transaction—a mere instance of intercourse between the President and the Senate in the manner which is usual and indispensable in communications between the different branches of the Government. It was

not addressed either to Austria or Hungary, nor was it any public manifesto to which any foreign state was called on to reply. It was an account of its transactions communicated by the Executive Government to the Senate at the request of that body—made public, indeed, but made public only because such is the common and usual course of proceeding—and it may be regarded as somewhat strange, therefore, that the Austrian cabinet did not perceive that, by the instructions given to Mr. Hülsemann, it was itself interfering with the domestic concerns of a foreign state, the very thing which is the ground of its complaint against the United States.

“This Department has on former occasions informed the ministers of foreign powers that a communication from the President to either house of Congress is regarded as a domestic communication, of which, ordinarily, no foreign state has cognizance, and in more recent instances the great inconvenience of making such communications subjects of diplomatic correspondence and discussion has been fully shown. If it had been the pleasure of His Majesty the Emperor of Austria during the struggles in Hungary to have admonished the provisional Government or the people of that country against involving themselves in disaster by following the evil and dangerous example of the United States of America in making efforts for the establishment of independent governments, such an admonition from that sovereign to his Hungarian subjects would not have originated here a diplomatic correspondence. The President might, perhaps, on this ground have declined to direct any particular reply to Mr. Hülsemann’s note; but out of proper respect for the Austrian Government it has been thought better to answer that note at length, and the more especially as the occasion is not unfavorable for the expression of the general sentiments of the Government of the United States upon the topics which that note discusses.

“A leading subject in Mr. Hülsemann’s note is that of the correspondence between Mr. Hülsemann and the predecessor of the undersigned, in which Mr. Clayton, by direction of the President, informed Mr. Hülsemann ‘that Mr. Mann’s mission had no other object in view than to obtain reliable information as to the true state of affairs in Hungary by personal observation.’ Mr. Hülsemann remarks that ‘this explanation can hardly be admitted, for it says very little as to the cause of the anxiety which was felt to ascertain the chances of the revolutionists.’ As this, however, is the only purpose which can, with any appearance of truth, be attributed to the agency, as nothing whatever is alleged by Mr. Hülsemann to have been either done or said by the agent inconsistent with such an object, the undersigned conceives that Mr. Clayton’s explanation ought to be deemed not only admissible but quite satisfactory. Mr. Hülsemann states in the course of his note that his instructions to address his present communication to Mr. Clayton

reached Washington about the time of the lamented death of the late President, and that he delayed from a sense of propriety the execution of his task until the new Administration should be fully organized, 'a delay which he now rejoices at, as it has given him the opportunity of ascertaining from the new President himself, on the occasion of the reception of the diplomatic corps, that the fundamental policy of the United States, so frequently proclaimed, would guide the relations of the American Government with other powers.' Mr. Hülsemann also observes that it is in his power to assure the undersigned 'that the Imperial Government is disposed to cultivate relations of friendship and good understanding with the United States.' The President receives this assurance of the disposition of the Imperial Government with great satisfaction, and, in consideration of the friendly relations of the two Governments thus mutually recognized, and of the peculiar nature of the incidents by which their good understanding is supposed by Mr. Hülsemann to have been, for a moment, disturbed or endangered, the President regrets that Mr. Hülsemann did not feel himself at liberty wholly to forbear from the execution of instructions, which were of course transmitted from Vienna without any foresight of the state of things under which they would reach Washington. If Mr. Hülsemann saw in the address of the President to the diplomatic corps satisfactory pledges of the sentiments and the policy of this Government in regard to neutral rights and neutral duties, it might, perhaps, have been better not to bring on a discussion of past transactions. But the undersigned readily admits that this was a question fit only for the consideration and decision of Mr. Hülsemann himself; and although the President does not see that any good purpose can be answered by reopening the inquiry into the propriety of the steps taken by President Taylor to ascertain the probable issue of the late civil war in Hungary, justice to his memory requires the undersigned briefly to restate the history of those steps and to show their consistency with the neutral policy which has invariably guided the Government of the United States in its foreign relations, as well as with the established and well-settled principles of national intercourse and the doctrines of public law.

"The undersigned will first observe that the President is persuaded His Majesty the Emperor of Austria does not think that the Government of the United States ought to view, with unconcern, the extraordinary events which have occurred, not only in his dominions, but in many other parts of Europe, since February, 1848. The Government and people of the United States, like other intelligent governments and communities, take a lively interest in the movements and the events of this remarkable age, in whatever part of the world they may be exhibited. But the interest taken by the United States in those events has not proceeded from any disposition to depart from that neutrality

toward foreign powers which is among the deepest principles and the most cherished traditions of the political history of the Union. It has been the necessary effect of the unexampled character of the events themselves, which could not fail to arrest the attention of the contemporary world, as they will doubtless fill a memorable page in history. But the undersigned goes further, and freely admits that in proportion as these extraordinary events appeared to have their origin in those great ideas of responsible and popular governments, on which the American constitutions themselves are wholly founded, they could not but command the warm sympathy of the people of this country.

“ Well-known circumstances in their history, indeed their whole history, have made them the representatives of purely popular principles of government. In this light they now stand before the world. They could not, if they would, conceal their character, their condition, or their destiny. They could not, if they so desired, shut out from the view of mankind the causes which have placed them, in so short a national career, in the station which they now hold among the civilized states of the world. They could not, if they desired it, suppress either the thoughts or the hopes which arise in men’s minds, in other countries, from contemplating their successful example of free government. That very intelligent and distinguished personage, the Emperor Joseph the Second, was among the first to discern this necessary consequence of the American Revolution on the sentiments and opinions of the people of Europe. In a letter to his minister in the Netherlands in 1787, he observes that ‘it is remarkable that France, by the assistance which she afforded to the Americans, gave birth to reflections on freedom.’ This fact, which the sagacity of that monarch perceived at so early a day, is now known and admitted by intelligent powers all over the world. True, indeed, it is, that the prevalence on the other continent of sentiments favorable to republican liberty, is the result of the reaction of America upon Europe; and the source and center of this reaction has doubtless been, and now is, in these United States. The position thus belonging to the United States is a fact as inseparable from their history, their constitutional organization, and their character, as the opposite position of the powers composing the European alliance is from the history and constitutional organization of the government of those powers. The sovereigns who form that alliance have not unfrequently felt it their right to interfere with the political movements of foreign states; and have, in their manifestoes and declarations, denounced the popular ideas of the age in terms so comprehensive as of necessity to include the United States, and their forms of government. It is well known that one of the leading principles announced by the allied sovereigns, after the restoration of the Bourbons, is, that all popular or constitutional rights are holden no otherwise than as grants and indulgences from crowned heads. ‘Useful and necessary changes in legis-

lation and administration,' says the Laybach Circular of May, 1821, 'ought only to emanate from the free will and intelligent conviction of those whom God has rendered responsible for power; all that deviates from this line necessarily leads to disorder, commotions, and evils far more insufferable than those which they pretend to remedy.' And his late Austrian Majesty, Francis I, is reported to have declared in an address to the Hungarian Diet, in 1820, that 'the whole world had become foolish, and, leaving their ancient laws, was in search of imaginary constitutions.' These declarations amount to nothing less than a denial of the lawfulness of the origin of the Government of the United States, since it is certain that that Government was established in consequence of a change which did not proceed from thrones, or the permission of crowned heads. But the Government of the United States heard these denunciations of its fundamental principles without remonstrance, or the disturbance of its equanimity. This was thirty years ago.

"The power of this Republic, at the present moment, is spread over a region, one of the richest and most fertile on the globe, and of an extent in comparison with which the possessions of the house of Hapsburg are but as a patch on the earth's surface. Its population, already 25,000,000, will exceed that of the Austrian Empire within the period during which it may be hoped that Mr. Hülsemann may yet remain in the honorable discharge of his duties to his Government. Its navigation and commerce are hardly exceeded by the oldest and most commercial nations; its maritime means and its maritime power may be seen by Austria herself, in all seas where she has ports, as well as it may be seen, also, in all other quarters of the globe. Life, liberty, property, and all personal rights are amply secured to all citizens, and protected by just and stable laws; and credit, public and private, is as well established as in any government of continental Europe. And the country, in all its interests and concerns, partakes most largely in all the improvements and progress which distinguish the age. Certainly, the United States may be pardoned, even by those who profess adherence to the principles of absolute governments, if they entertain an ardent affection for those popular forms of political organization which have so rapidly advanced their own prosperity and happiness, and enabled them, in so short a period, to bring their country and the hemisphere to which it belongs to the notice and respectful regard, not to say the admiration, of the civilized world. Nevertheless, the United States have abstained, at all times, from acts of interference with the political changes of Europe. They can not, however, fail to cherish always a lively interest in the fortunes of nations struggling for institutions like their own. But this sympathy, so far from being necessarily a hostile feeling toward any of the parties to these great national struggles, is quite consistent with amicable relations with them all.

The Hungarian people are three or four times as numerous as the inhabitants of these United States were when the American Revolution broke out. They possess, in a distinct language, and in other respects, important elements of a separate nationality, which the Anglo-Saxon race in this country did not possess, and if the United States wish success to countries contending for popular constitutions and national independence it is only because they regard such constitutions and such national independence not as imaginary, but as real blessings. They claim no right, however, to take part in the struggles of foreign powers in order to promote these ends. It is only in defense of his own Government, and its principles and character, that the undersigned has now expressed himself on this subject. But when the United States behold the people of foreign countries without any such interference spontaneously moving toward the adoption of institutions like their own, it surely can not be expected of them to remain wholly indifferent spectators.

“In regard to the recent very important occurrences in the Austrian Empire, the undersigned freely admits the difficulty which exists in this country, and is alluded to by Mr. Hülsemann, of obtaining accurate information. But this difficulty is by no means to be ascribed to what Mr. Hülsemann calls—with little justice, as it seems to the undersigned—‘the mendacious rumors propagated by the American press.’ For information on this subject, and others of the same kind, the American press is, of necessity, almost wholly dependent upon that of Europe; and if ‘mendacious rumors’ respecting Austrian and Hungarian affairs have been anywhere propagated, that propagation of falsehoods has been most prolific on the European continent, and in countries immediately bordering on the Austrian Empire. But, wherever these errors may have originated, they certainly justified the late President in seeking true information through authentic channels. His attention was, first, particularly drawn to the state of things in Hungary, by the correspondence of Mr. Stiles, *chargé d’affaires* of the United States at Vienna. In the autumn of 1848, an application was made to this gentleman, on behalf of Mr. Kossuth, formerly minister of finance for the Kingdom of Hungary by imperial appointment, but at the time the application was made chief of the revolutionary government. The object of this application was to obtain the good offices of Mr. Stiles with the Imperial Government, with a view to the suspension of hostilities. This application became the subject of a conference between Prince Schwarzenberg, the imperial minister for foreign affairs, and Mr. Stiles. The prince commended the considerateness and propriety with which Mr. Stiles had acted; and, so far from his disapproving his interference, advised him, in case he received a further communication from the revolutionary government in Hungary, to have an interview with Prince Windischgrätz, who was charged by

the Emperor with the proceedings determined on in relation to that Kingdom. A week after these occurrences, Mr. Stiles received, through a secret channel, a communication signed by L. Kossuth, president of the committee of defense, and countersigned by Francis Pulsky, secretary of state. On the receipt of this communication, Mr. Stiles had an interview with Prince Windischgrätz, 'who received him with the utmost kindness, and thanked him for his efforts toward reconciling the existing difficulties.' Such were the incidents which first drew the attention of the Government of the United States particularly to the affairs of Hungary, and the conduct of Mr. Stiles, though acting without instructions in a matter of much delicacy, having been viewed with satisfaction by the Imperial Government, was approved by that of the United States.

"In the course of the year 1848 and in the early part of 1849, a considerable number of Hungarians came to the United States. Among them were individuals representing themselves to be in the confidence of the revolutionary government, and by these persons the President was strongly urged to recognize the existence of that government. In these applications, and in the manner in which they were viewed by the President, there was nothing unusual; still less was there anything unauthorized by the law of nations. It is the right of every independent state to enter into friendly relations with every other independent state. Of course, questions of prudence naturally arise in reference to new states, brought by successful revolutions into the family of nations; but it is not to be required of neutral powers that they should await the recognition of the new government by the parent state. No principle of public law has been more frequently acted upon, within the last thirty years, by the great powers of the world than this. Within that period eight or ten new states have established independent governments within the limits of the colonial dominions of Spain on this continent, and in Europe the same thing has been done by Belgium and Greece. The existence of all these governments was recognized by some of the leading powers of Europe, as well as by the United States, before it was acknowledged by the states from which they had separated themselves. If, therefore, the United States had gone so far as formally to acknowledge the independence of Hungary, although, as the result has proved, it would have been a precipitate step, and one from which no benefit would have resulted to either party, it would not, nevertheless, have been an act against the law of nations, provided they took no part in her contest with Austria. But the United States did no such thing. Not only did they not yield to Hungary any actual countenance or succor; not only did they not show their ships of war in the Adriatic with any menacing or hostile aspect, but they studiously abstained from everything which had not been done in other cases in times past, and contented themselves with instituting an inquiry into

the truth and reality of alleged political occurrences. Mr. Hülsemann incorrectly states, unintentionally certainly, the nature of the mission of this agent, when he says that 'a United States agent had been dispatched to Vienna with orders to watch for a favorable moment to recognize the Hungarian republic, and to conclude a treaty of commerce with the same.' This, indeed, would have been a lawful object, but Mr. Mann's errand was, in the first instance, purely one of inquiry. He had no power to act, unless he had first come to the conviction that a firm and stable Hungarian government existed. 'The principal object the President has in view,' according to his instructions, 'is to obtain minute and reliable information in regard to Hungary in connection with the affairs of adjoining countries, the probable issue of the present revolutionary movements, and the chances we may have of forming commercial arrangements with that power favorable to the United States.' Again, in the same paper, it is said: 'The object of the President is to obtain information in regard to Hungary, and her resources and prospects, with a view to an early recognition of her independence and the formation of commercial relations with her.' It was only in the event that the new government should appear, in the opinion of the agent, to be firm and stable, that the President proposed to recommend its recognition.

"Mr. Hülsemann, in qualifying these steps of President Taylor with the epithet of 'hostile,' seems to take for granted that the inquiry could, in the expectation of the President, have but one result, and that favorable to Hungary. If this were so, it would not change the case. But the American Government sought for nothing but truth; it desired to learn the facts through a reliable channel. It so happened, in the chances and vicissitudes of human affairs, that the result was adverse to the Hungarian revolution. The American agent, as was stated in his instructions to be not unlikely, found the condition of Hungarian affairs less prosperous than it had been, or had been believed to be. He did not enter Hungary nor hold any direct communication with her revolutionary leaders. He reported against the recognition of her independence because he found she had been unable to set up a firm and stable government. He carefully forbore, as his instructions required, to give publicity to his mission, and the undersigned supposes that the Austrian Government first learned its existence from the communications of the President to the Senate.

"Mr. Hülsemann will observe from this statement that Mr. Mann's mission was wholly unobjectionable, and strictly within the rule of the law of nations, and the duty of the United States as a neutral power. He will accordingly feel how little foundation there is for his remark, that 'those who did not hesitate to assume the responsibility of sending Mr. Dudley Mann on such an errand, should, independent of considerations of propriety, have borne in mind that they were exposing



their emissary to be treated as a spy.' A spy is a person sent by one belligerent to gain secret information of the forces and defenses of the other, to be used for hostile purposes. According to practice, he may use deception, under the penalty of being lawfully hanged if detected. To give this odious name and character to a confidential agent of a neutral power, bearing the commission of his country, and sent for a purpose fully warranted by the law of nations, is not only to abuse language, but also to confound all just ideas, and to announce the wildest and most extravagant notions, such as certainly were not to have been expected in a grave diplomatic paper; and the President directs the undersigned to say to Mr. Hülsemann that the American Government would regard such an imputation upon it by the cabinet of Austria, as that it employs spies, and that in a quarrel none of its own, as distinctly offensive, if it did not presume, as it is willing to presume, that the word used in the original German was not of equivalent meaning with 'spy' in the English language, or that in some other way the employment of such an opprobrious term may be explained. Had the Imperial Government of Austria subjected Mr. Mann to the treatment of a spy, it would have placed itself without the pale of civilization, and the cabinet of Vienna may be assured that if it had carried, or attempted to carry, any such lawless purpose into effect in the case of an authorized agent of this Government the spirit of the people of this country would have demanded immediate hostilities to be waged by the utmost exertion of the power of the Republic—military and naval.

"Mr. Hülsemann proceeds to remark that 'this extremely painful incident, therefore, might have been passed over without any written evidence being left on our part in the archives of the United States had not General Taylor thought proper to revive the whole subject by communicating to the Senate, in his message of the 18th [28th] of last March, the instructions with which Mr. Mann had been furnished on the occasion of his mission to Vienna. The publicity which has been given to that document has placed the Imperial Government under the necessity of entering a formal protest, through its official representative, against the proceedings of the American Government lest that Government should construe our silence into approbation, or toleration even, of the principles which appear to have guided its action and the means it has adopted.' The undersigned reasserts to Mr. Hülsemann and to the cabinet of Vienna, and in the presence of the world, that the steps taken by President Taylor, now protested against by the Austrian Government, were warranted by the law of nations and agreeable to the usages of civilized states. With respect to the communication of Mr. Mann's instructions to the Senate, and the language in which they are couched, it has already been said—and Mr. Hülsemann must feel the justice of the remark—that these are domestic affairs, in reference to which the Government of the United States can not admit the slightest

responsibility to the Government of His Imperial Majesty. No state deserving the appellation of independent can permit the language in which it may instruct its own officers in the discharge of their duties to itself to be called in question under any pretext by a foreign power; but even if this were not so, Mr. Hülsemann is in error in stating that the Austrian Government is called an 'iron rule' in Mr. Mann's instructions. That phrase is not found in the paper, and in respect to the honorary epithet bestowed in Mr. Mann's instructions on the late chief of the revolutionary government of Hungary, Mr. Hülsemann will bear in mind that the Government of the United States can not justly be expected, in a confidential communication to its own agent, to withhold from an individual an epithet of distinction of which a great part of the world thinks him worthy merely on the ground that his own Government regards him as a rebel. At an early stage of the American Revolution, while Washington was considered by the English Government as a rebel chief, he was regarded on the continent of Europe as an illustrious hero; but the undersigned will take the liberty of bringing the cabinet of Vienna into the presence of its own predecessors, and of citing for its consideration the conduct of the Imperial Government itself. In the year 1777 the war of the American Revolution was raging all over these United States. England was prosecuting that war with a most resolute determination, and by the exertion of all her military means to the fullest extent. Germany was at that time at peace with England, and yet an agent of that Congress, which was looked upon by England in no other light than that of a body in open rebellion, was not only received with great respect by the ambassador of the Empress Queen at Paris, and by the minister of the Grand Duke of Tuscany, who afterwards mounted the imperial throne, but resided in Vienna for a considerable time—not, indeed, officially acknowledged, but treated with courtesy and respect, and the Emperor suffered himself to be persuaded by that agent to exert himself to prevent the German powers from furnishing troops to England to enable her to suppress the rebellion in America. Neither Mr. Hülsemann nor the cabinet of Vienna it is presumed will undertake to say that anything said or done by this Government in regard to the recent war between Austria and Hungary is not borne out, and much more than borne out, by this example of the imperial court. It is believed that the Emperor, Joseph the Second, habitually spoke in terms of respect and admiration of the character of Washington, as he is known to have done of that of Franklin, and he deemed it no infraction of neutrality to inform himself of the progress of the Revolutionary struggle in America, nor to express his deep sense of the merits and the talents of those illustrious men who were then leading their country to independence and renown. The undersigned may add that in 1781 the courts of Russia and Austria proposed a diplomatic congress of the belligerent powers, to which the commissioners of the United States should be admitted.

“Mr. Hülsemann thinks that in Mr. Mann’s instructions improper expressions are introduced in regard to Russia, but the undersigned has no reason to suppose that Russia herself is of that opinion. The only observation made in those instructions about Russia is that she ‘has chosen to assume an attitude of interference, and her immense preparations for invading and reducing the Hungarians to the rule of Austria, from which they desire to be released, gave so serious a character to the contest as to awaken the most painful solicitude in the minds of Americans.’ The undersigned can not but consider the Austrian cabinet as unnecessarily susceptible in looking upon language like this as a ‘hostile demonstration.’ If we remember that it was addressed by the Government to its own agent, and has received publicity only through a communication from one Department of the American Government to another, the language quoted must be deemed moderate and inoffensive. The comity of nations would hardly forbid its being addressed to the two imperial powers themselves. It is scarcely necessary for the undersigned to say that the relations of the United States with Russia have always been of the most friendly kind, and have never been deemed by either party to require any compromise of their peculiar views upon subjects of domestic or foreign policy or the true origin of governments. At any rate, the fact that Austria in her contest with Hungary had an intimate and faithful ally in Russia can not alter the real nature of the question between Austria and Hungary, nor in any way affect the neutral rights and duties of the Government of the United States or the justifiable sympathies of the American people. It is, indeed, easy to conceive that favor toward struggling Hungary would be not diminished, but increased, when it was seen that the arm of Austria was strengthened and upheld by a power whose assistance threatened to be, and which in the end proved to be, overwhelmingly destructive of all her hopes.

“Toward the conclusion of his note Mr. Hülsemann remarks that ‘if the Government of the United States were to think it proper to take an indirect part in the political movements of Europe, American policy would be exposed to acts of retaliation and to certain inconveniences which would not fail to affect the commerce and industry of the two hemispheres.’ As to this possible fortune—this hypothetical retaliation—the Government and people of the United States are quite willing to take their chances and abide their destiny. Taking neither a direct nor an indirect part in the domestic or intestine movements of Europe, they have no fear of events of the nature alluded to by Mr. Hülsemann. It would be idle now to discuss with Mr. Hülsemann those acts of retaliation which he imagines may possibly take place at some indefinite time hereafter. Those questions will be discussed when they arise, and Mr. Hülsemann and the cabinet at Vienna may rest assured that, in the meantime, while performing with strict and exact fidelity all their neutral duties, nothing will

deter either the Government or the people of the United States from exercising, at their own discretion, the rights belonging to them as an independent nation, and of forming and expressing their own opinions, freely and at all times, upon the great political events which may transpire among the civilized nations of the earth. Their own institutions stand upon the broadest principles of civil liberty, and believing those principles and the fundamental laws in which they are embodied to be eminently favorable to the prosperity of states—to be, in fact, the only principles of government which meet the demands of the present enlightened age—the President has perceived with great satisfaction that, in the constitution recently introduced into the Austrian Empire, many of these great principles are recognized and applied, and he cherishes a sincere wish that they may produce the same happy effects throughout his Austrian Majesty's extensive dominions that they have done in the United States."

Mr. Webster, Sec. of State, to Mr. Hülsemann, Dec. 21, 1850, S. Ex. Doc. 43, 31 Cong. 1 Sess.; Br. & For. State Papers, XXXVIII. (1849, 1850) 273; Webster's Works, VI. 491.

A fictitious reply to the note of Mr. Webster, said to have been made by Mr. Hülsemann July 4, 1851, was published in some of the American newspapers, from which it was reproduced in *Lesur, l'Annuaire*, 1851, p. 183, as authentic. (Lawrence, *Com. sur les Éléments du Droit Int.*, I. 204.)

The first draft of Mr. Webster's note appears to have been made by William Hunter, for many years an honored official of the Department of State. Subsequently, another draft was made at Mr. Webster's request by Edward Everett; and finally Mr. Webster, with these two drafts before him, cast the note into the form in which it became historical. (Curtis, *Life of Webster*, II. 535-537.)

Mr. Rhodes criticises the note as "hardly more than a stump speech under diplomatic guise." (*History of the United States*, I. 206, cited in Foster's *Century of American Diplomacy*, 331.) Curtis, in his *Life of Daniel Webster*, II. 537, observes that "there are, no doubt, passages and expressions in this letter which are in a tone not usual with Mr. Webster in his diplomatic papers;" and he quotes the following letter written by Mr. Webster to Mr. Ticknor, Jan. 16, 1851: "If you say that my Hülsemann letter is boastful and rough, I shall own the soft impeachment. My excuse is twofold: 1. I thought it well enough to speak out, and tell the people of Europe who and what we are, and awaken them to a just sense of the unparalleled growth of this country. 2. I wished to write a paper which should touch the national pride, and make a man feel *sheepish* and look *silly* who should speak of disunion. It is curious enough, but it is certain, that Mr. Mann's private instructions were seen, somehow, by Schwartzberg."

When the correspondence was laid before the Senate, a motion to print 10,000 extra copies of it was opposed by Mr. Clay, and was defeated by a vote of 21 to 18. Mr. Clay said that if a State of the United States had been in revolt, and a European government had sent an agent on such a mission as that of Mr. Mann, it would have created a great deal of feeling. He therefore doubted the soundness of Mr. Webster's contention that it was a purely domestic transaction. It was published to the world. Its domestic character did not limit its publicity. (*Political Science Quarterly*, X. 266.)

"As regards the government which has recently been set up by the white settlers in the name of King Thakombau [in Fiji], I have in another dispatch informed you that as long as this newly constituted government exercises actual authority you should deal with it as a *de facto* government, so far as concerns the districts which may acknowledge its rule, but that Her Majesty's Government are not prepared to give any opinion as to the propriety of formally recognizing it without much fuller information as to its character and prospects." (Earl of Kimberly, Colonial Secretary, to the Earl of Belmore, November 3, 1871, C. 509, March, 1872, 2.)

## 2. OF NEW GOVERNMENTS.

### § 73.

That the recognition of a government is not necessarily to be implied from the fact of holding communication, whether oral or written, with it, is a principle of **Unofficial communications.** which numerous illustrations may be found in the precedents heretofore discussed, in connection with the recognition of new governments; and the same principle has been seen to be applicable to intercourse with the authorities of new states claiming to be recognized as independent. In the case of new governments, however, a situation usually exists which does not arise in the case of new states. In the latter case special agents are, where there is occasion for them, employed, since the dispatch of a minister to a new state is one of the acts from which its recognition is necessarily implied; but, in the case of a new government, the question of recognition as a rule practically concerns only the powers that have already recognized the state and established regular diplomatic relations with it. There has thus arisen a certain right of diplomatic representation; and the sending of a new minister or the retention of an old one, while it implies continued recognition of the state, does not constitute a recognition of the new government, so long as there is no formal presentation of credentials and communications bear only an unofficial character.

This distinction is tacitly assumed, if not expressed, in some of the utterances quoted in this section.

"This Government has, and it must insist on, the right to determine for itself when new authorities, established in a foreign **Venezuela.** state, can claim from it a formal recognition of them as an established power. The regulation of the exercise of that right upon principles of justice and according to facts established, with an absence of all favor and caprice, is hardly more important to the universal interests of society than it is to those of the United States themselves.

"This Government has, at the same time under the law of nations and by treaty, a clear right to have its properly appointed agents residing in Venezuela, although the authorities with which it has heretofore

treated have been subverted, more or less completely, and to communicate with the new authorities upon international matters affecting either the Government of the United States or its citizens. During the period, which, in case of any domestic revolution, may be either short or long, the agents of this Government have a right to confer upon such matters with the actual authorities who are conducting the affairs of Venezuela, and while the agent is bound to avoid all interference in the domestic questions of that state, he is entitled to be heard as the representative of the United States, without a previous recognition of the existing authorities, in place of those which have been either more or less effectually supplanted."

Mr. Seward, Sec. of State, to Mr. Culver, Mar. 9, 1863, MS. Inst. Venez. I. 266.

When in the autumn of 1863 Mr. Bruzual arrived in Washington as the diplomatic representative of Venezuela appointed by the new Falcon government, he was "informed that the existing government of Venezuela was not considered to be consolidated enough to warrant a compliance with his request [to present his credentials] at present. It was added, however, that he might be expected to enjoy any privileges and immunities incident to his official character which were usually extended to diplomatic agents of friendly powers under similar circumstances."

Mr. Seward, Sec. of State, to Mr. Culver, Oct. 21, 1863, MS. Inst. Venezuela, I. 288. See *supra*, 150.

"Señor Augusto F. Pulido, chargé of the Venezuelan legation, called at the Department yesterday afternoon to make oral announcement that, under instructions from the Venezuelan minister of foreign affairs, who appears to be the same person formerly in President Andrade's cabinet, the chargé d'affaires and consuls of Venezuela in the United States are continued in the exercise of their functions until further notice.

"Mr. Pulido was thereupon told that this Government would simply ignore the fact of a change of government in Venezuela until the question of its recognition should be raised by formal announcement and request to that end, and that the Department would in the meantime conduct all necessary diplomatic business with Señor Pulido precisely the same as if no change had occurred in the home government."

Mr. Hay, Secretary of State, to Mr. Loomis, Minister to Venezuela, November 13, 1899, For. Rel. 1899, 809.

It has been seen that Mr. Seward, in narrating his refusal informally to receive an agent of Maximilian, stated that it was the rule of the United States "to hold no interview, public or private, with persons coming from any country, other than the agents duly accredited by the authority of that country which is

Salvador.

recognized by this Government." (Dip. Cor. 1865, III. 378; *supra*, 210.) The emissaries whom he declined to see were as a rule the enemies of recognized governments. On one occasion, however, in the case of a revolution in Salvador, he so extended the principle on which he acted as to include the representative of parties in "armed opposition" to a government which, though he describes it as "actually existing," he had refused to recognize. The representative in question was the head of the government that had just been overthrown. The representative of the new but unrecognized government was admitted to unofficial relations.

"While this government does not intend or desire to question the rightfulness or the stability of the government now provisionally existing in Salvador, \* \* \* it does not find itself at liberty to make a formal recognition at the present moment of that provisional government. The United States will at present watch and wait for the permanent reestablishing of government in Salvador, interpreting as favorably as possible all the proceedings that shall take place there with a view to that great end. In the meantime, there being no other person in the United States claiming to represent Salvador, all communications Mr. Yrisarri [who had submitted credentials as minister of the new government] may have occasion to make to this government will be received unofficially and have respectful attention. You will unofficially communicate this information to the provisional President, and until you shall receive further instructions, will not claim to be officially and formally recognized by him."

Mr. Seward, Sec. of State, to Mr. Partridge, minister to Salvador, Jan. 2, 1864, MS. Inst. American States, XVI. 399.

"We shall await with calmness and good will the action of the people of Salvador in recognizing their government.

"Mr. Barrios, the exiled President of that Republic, has requested an interview with me. I have declined it as I invariably do to hold interviews with persons who come hither to represent parties who are in armed opposition to the government actually existing in countries with which the United States are at peace.

"This Government will maintain absolute non-intervention in foreign wars and will not suffer the neutrality laws to be violated."

Mr. Seward, Sec. of State, to Mr. Partridge, minister to Salvador, No. 34, Jan. 29, 1864, MS. Inst. Am. States, XVI. 415.

During the period of more than a year, when, owing to the existence of disorders on the Rio Grande frontier, formal recognition was withheld from the newly installed Diaz government in Mexico, diplomatic correspondence was carried on through the usual channels on all matters arising between the two countries, President Hayes, in his annual message of December 3, 1877,

saying: "It is gratifying to add that this temporary interruption of official relations has not prevented due attention by the representatives of the United States in Mexico to the protection of American citizens, so far as practicable. Nor has it interfered with the prompt payment of the amounts due from Mexico to the United States under the treaty of July 4, 1868, and the awards of the joint commission."

In July, 1865, Mr. Louis de Arroyo published in a newspaper in the city of New York a decree of the government of **Consular functions.** Maximilian in Mexico, stating that it pertained to the consuls and vice-consuls of the empire to legalize invoices and manifests of merchandise for Mexican ports, as well as all documents required by the laws to be legalized; and that the agents appointed by "the administration of Don Benito Juarez" were to discontinue their functions, since that administration came to end on July 31, 1863. This decree was addressed by the imperial treasury to Mr. Arroyo as "consul, acting as commercial agent, New York." It was brought to the attention of Mr. Seward by the Mexican minister at Washington, who inquired (1) whether Maximilian was considered to have the right to appoint commercial agents who should exercise the functions of consuls in the United States, and (2) whether such agents could "exercise the functions of consuls, not only without a formal *exequatur*, but also without any other sort of permission or recognition from the Government of the United States." Mr. Seward replied:

"This department is not aware of any law of the United States which forbids a person claiming to be a consul of a foreign power from making on his own responsibility a publication of the character to which you refer.

"It can not be necessary for me to repeat what has uniformly been said by this government in all its official correspondence, that no other than the republican government in Mexico has been recognized by the United States. You are aware, however, that the party in arms against that government is, and for some time past has been, in possession of some, at least, of the ports of Mexico. That possession carries with it, for the time being, a power to prescribe the terms upon which foreign commerce may be carried on with those ports. If, as is presumed to be the case, one of those conditions is, that the invoices and manifests of vessels from abroad, bound to those ports, must be certified by a commercial agent of the party in possession, residing in the port of the foreign country from which the vessel may proceed, it is not perceived what effective measures this government could properly take in the premises. Such a commercial agent can perform no consular act relating to the affairs of his countrymen in the United States. To prohibit him from attesting invoices and manifests, under



the circumstances referred to, would be tantamount to an interdiction of trade between the United States and those Mexican ports which are not in possession of the republican government of that country. The consuls of the United States in Mexico, who have their exequaturs from that government only, themselves discharge duties as commercial agents in the ports which are not under the control of that government in all respects like those which the person Arroyo, in the same way and to the same extent, claims to do at New York in respect to said ports."

Mr. Seward, Sec. of State, to Mr. Romero, Mexican minister, Aug. 9, 1865, Dip. Cor. 1865, III. 486-488.

"I have received your Nos. 44 and 47, of the 14th and 17th ultimo, respectively. They relate to the political disturbances in Nicaragua in consequence of the imprisonment of President Machado and the minister for foreign affairs at Leon, and report the circumstances under which General Zavala was proclaimed Dictator.

"In reply I desire to state that the shifting course of present events in Nicaragua precludes any positive instructions looking to the recognition of any one party as the dominant Government of the Republic. The long established rule of the United States is to maintain relations with the power having control of the public machinery of government with the assent of the people, and administering the functions of the State.

"Your present dispatches and the later telegraphic reports published in the press do not indicate such a stable retention of public power as to warrant formal action by the United States in recognition of a government in Nicaragua as being titular and effective. In such case the minister should remain in intercourse with the authorities in control of the seat of government, looking to them for the protection of the interests of American citizens.

"To avert embarrassments in dealing with evenly-balanced factions, alternating in power or succeeding thereto in the changes of civil contest, the minister's tact should be exercised to confine his relations with the ascendant authority to questions affecting the public interests of the United States and the security of American life and property in Nicaragua, thus giving to his intercourse a provisional and de facto character, without sympathetic leaning to either side, and without prejudice to the fullest liberty on the part of the United States to declare formal recognition of the government which shall eventually establish itself on a firm basis and effectively administer the affairs of the state and insure orderly respect for its acts by the people of the nation."

Mr. Gresham, Secretary of State, to Mr. Baker, minister to Nicaragua, August 15, 1893, For. Rel., 1893, 212.

"I have the honor to acknowledge the receipt of your letter of the 27th ultimo reporting that you have received an inquiry from the commanding officer of the U. S. S. *Nashville*, asking whether this Government recognizes the existing government in the Dominican Republic and whether he should fire the customary salute at San Domingo City.

"In reply, I have the honor to say that no political recognition of the revolutionary Government of Santo Domingo has yet been effected. Until the United States chargé d'affaires shall under suitable instructions notify the existing government of that country that he enters into diplomatic relations with it, its existence is merely a matter of common notoriety, while its unopposed exercise of power warrants the transaction of necessary affairs by local agents of the United States with the *de facto* authorities. A salute does not appear to be necessary unless by way of courteous response to one first given by the local authorities."

Mr. Hay, Sec. of State, to the Secretary of the Navy, October 2, 1899, 240 MS. Dom. Let. 353.

The question of salutes, pending an insurrection, became the subject of official action by the United States during the naval revolt in Brazil in 1893. On the 20th of October in that year, Commodore O. F. Stanton, U. S. N., then in command of the United States naval forces on the South Atlantic Station, arrived in his flagship at Rio de Janeiro. On entering the port he saluted the flag of Brazil with 21 guns, his salute being returned by a Government fort. Inside the harbor lay the vessels in revolt, under the command of Rear-Admiral Mello, of the Brazilian navy, who flew from his flagship, the *Aquidaban*, the Brazilian flag. After coming to anchor, Commodore Stanton received a visit from Admiral Mello's aide, and caused it to be returned. Subsequently he saluted Admiral Mello with 13 guns, the salute being returned, and next day he called upon the admiral, who returned his visit. No call had then been received by Commodore Stanton from any Brazilian official on shore. The Brazilian Government complained of his action, and he was detached from his command and ordered home. In explanation of his course, he stated that his object was merely to complete the salute usually fired in honor of a nation on arriving in one of its ports; that, although he was aware that the titular government had by a decree of October 10 withdrawn from the vessels in revolt the protection of the national flag, he regarded the *Aquidaban* as a Brazilian man-of-war, the flagship of an admiral, and the property of the Brazilian nation, whichever party might win in the pending conflict; that Mello was in fact referred to in the decree as "rear-admiral," and on the exchange of visits wore the uniform of a Brazilian naval officer of that rank; that the salute was intended not as a recognition of the revolt, but merely as an honor to the Brazilian flag, Mello being the only Brazilian admiral afloat. The Navy Department, however, held that Commodore Stanton's action violated article 115 of the U. S. Navy Regulations, 1893, which provides that "no salute shall be fired in honor of any nation \* \* \* not formally recognized by the Government of the United States;" that his first salute of the Brazilian flag and its return by

the Government fort satisfied all the requirements of courtesy to Brazil as a nation; that, as it was known that the United States had not recognized Admiral Mello and his forces as entitled to belligerent rights, it was not material that he was referred to as a rear-admiral or was dressed in the uniform of that rank; that a course of reasoning which held that a government or a flag gave status to an officer in spite of what he or his government might do, was manifestly not sound; and that neither the use of the Brazilian uniform nor the flying of the Brazilian flag could give Admiral Mello an official status, as he was using both in opposition to the recognized government. The Navy Department therefore decided that Commodore Stanton had committed a "grave error of judgment," but as he had done no intentional wrong, and as the complaint of Brazil had been satisfied, placed him in charge of the North Atlantic Station, with a promise subsequently to restore him to the command from which he was detached.' (Sec. of Navy to Commodore Stanton, tel., Oct. 23, 1893; Commodore Stanton to Sec. of Navy, tel., Oct. 25, 1893; Sec. of Navy to Commodore Stanton, tel., Oct. 25, 1893; Commodore Stanton to Sec. of Navy, Dec. 6, 1893; Sec. of Navy to Commodore Stanton, Dec. 7, 1893; Commodore Stanton to Sec. of Navy, Dec. 7, 1893; Sec. of Navy to Commodore Stanton, Dec. 21, 1893; MSS. Navy Department.)

In the course of his explanation, Commodore Stanton stated that he had been informed by Commodore McCann, who commanded the United States naval forces on the Pacific Station during a part of the insurrection in Chile in 1891, that his flag was saluted by a Chilean commodore and that he returned the salute, and that one of the English men-of-war saluted the Chileans in revolt with 21 guns before the final triumph of the Congressionalists. With reference to this statement the Navy Department said: "I have examined into this matter and it does not appear that this action on the part of Commodore McCann, or of other officers who may have given like salutes to Chilean vessels in revolt at that time was ever approved by the Department, or that it was ever brought to its attention, unless such inference may be drawn from the fact that the new Regulations of the United States Navy, promulgated February 25, 1893, contained for the first time the regulation providing that 'No salute shall be fired in honor of any nation not formally recognized by the Government of the United States.' It is not to be supposed that the Department when inserting this article in the Regulations believed that a naval officer of the United States would fire a salute to a naval officer in revolt against his government, and then claim that the salute was really in honor of the government against which the officer and his forces were at war." (Mr. Herbert, Sec. of Navy, to Commodore Stanton, Dec. 21, 1893, MSS. Navy Dept.)

The only case which the editor has been able to find in the British official publications of a salute to an insurgent officer during the insurrection in Chile is as follows: On January 26, 1891, Rear-Admiral Hotham arrived in H. B. M. S. *Warspite* at Iquique. He found there the Chilean cruiser *Almirante Cochrane*, which was engaged in a nominal blockade of the port. The *Almirante Cochrane* was one of the vessels then in revolt against the government of President Balmaceda. She saluted Admiral Hotham's flag with 13 guns, "and," said Admiral Hotham, "as it was a personal salute I returned it with the same number." (Blue Book, Chile, No. 1, 1892, p. 45.)

## 3. OF BELLIGERENCY

## § 74.

Since every civil war, as was observed by the Supreme Court in the *Prize Cases*, begins in insurrection, and since insurrections generally affect to a greater or less extent the interests of aliens, and in this way, if in no other, compel the consideration and action of foreign governments, some progress appears to have been made toward the definition of the actual condition of things intermediate between peace and recognized civil war, as a state of "insurgency" or "revolt."<sup>a</sup> It doubtless will have been observed that, although the mere admission of insurgent ships into the ports of the United States in 1815 seems then to have been considered as a recognition of the belligerency of the South American governments, yet Mr. Bancroft Davis, speaking for the Department of State in 1869, with reference to the Cuban insurrection then prevailing, said that Mexico, while she had authorized the Cuban flag to be received in her ports, had "not recognized a state of belligerency."<sup>b</sup> This modification or development of view may be ascribed to the elaboration in the meantime of rules for the precise definition of belligerent rights and disabilities and for the discharge of neutral duties, such as that limiting the stay and the privileges of men-of-war of belligerents in neutral ports.

Perhaps the clearest recognition of the state of insurgency or revolt as a distinctive condition may be found in the case of the Cuban insurrection of 1895-1898. June 12, 1895, the President of the United States issued a proclamation reciting that Cuba was "the seat of civil disturbances, accompanied by armed resistance to the authority of the established Government of Spain," and admonishing all persons within the jurisdiction of the United States to abstain from taking part in the disturbances adversely to that Government, by doing any of the acts prohibited by the neutrality laws.<sup>c</sup> In his annual message of December 2, 1895, he stated that Cuba was "greatly disturbed," and described the condition of things as an "insurrection," a "flagrant condition of hostilities," and a "sanguinary and fiercely conducted war." July 27, 1896, he issued another proclamation, referring again to the civil disturbances in the island and the provisions of the neutrality laws.<sup>d</sup> In his annual message of December 7, 1896, he stated that "the insurrection in Cuba still continues with all its perplexities," and reviewed the situation at length. With reference to these facts the Supreme Court said:

"The distinction between recognition of belligerency and recognition of a condition of political revolt, between recognition of the

<sup>a</sup> See Albany Law Journal, Feb. 13, 1886, 125.

<sup>b</sup> *Supra*, 194.

<sup>c</sup> 29 Stat. 871.

<sup>d</sup> 29 Stat. 881.

existence of war in the material sense and of war in a legal sense, is sharply illustrated by the case before us. For here the political department has not recognized the existence of a *de facto* belligerent power engaged in hostility with Spain, but has recognized the existence of insurrectionary warfare prevailing before, at the time and since this forfeiture is alleged to have been incurred. \* \* \* We are thus judicially informed of the existence of an actual conflict of arms in resistance of the authority of a Government with which the United States are on terms of peace and amity, although acknowledgment of the insurgents as belligerents by the political department has not taken place; and it can not be doubted that, this being so, the act in question [the neutrality statute] is applicable."<sup>a</sup>

"I have to acknowledge the receipt of your Nos. 90, of January 26; 91, of February 1; 92, of February 3, and 93, of February 10 last, reporting the serious condition of affairs at La Paz and in the surrounding country.

"You will understand that you can have no diplomatic relations with the insurgents implying their recognition by the United States as the legitimate Government of Bolivia, but that, short of such recognition, you are entitled to deal with them as the responsible parties in local possession, to the extent of demanding for yourself, and for all Americans within reach of insurgent authority within the territory controlled by them, fullest protection for life and property.

"If the situation at La Paz becomes unendurable or more perilous, you should collect all Americans within reach and quit that city, taking them with you demanding adequate escort to the nearest place of safety."

Mr. Hay, Sec. of State, to Mr. Bridgman, min. to Bolivia, March 14, 1899, For. Rel., 1899, 105.

#### VI. RECOGNITION, BY WHOM DETERMINABLE.

##### § 75.

In the preceding review of the recognition, respectively, of new states, new governments, and belligerency, there has been made in each case a precise statement of facts, showing how and by whom the recognition was accorded. In every case, as it appears, of a new government and of

Summary of precedents.

<sup>a</sup>The Three Friends (1897), 166 U. S. 63-64, 65-66. In obtaining the release of Spanish prisoners from the insurgents in the Philippines, pursuant to Article VI. of the treaty of peace between the United States and Spain of December 10, 1898, a difficulty was raised by the insurgents insisting that Spanish vessels sent to receive the surrender of the prisoners should fly the Spanish flag as a sign of recognition. To meet the difficulty, the United States suggested that the vessels should fly the Geneva Red Cross flag. (For. Rel. 1899, 689-691.)

belligerency, the question of recognition was determined solely by the Executive. In the case of the Spanish-American republics, of Texas, of Hayti, and of Liberia, the President, before recognizing the new state, invoked the judgment and cooperation of Congress; and in each of these cases provision was made for the appointment of a minister, which, when made in due form, constitutes, as has been seen, according to the rules of international law, a formal recognition. In numerous other cases, the recognition was given by the Executive solely on his own responsibility. The question of the power to recognize has, however, been specifically discussed on various occasions.

January 1, 1819, a discussion took place in the Cabinet of Monroe on a draft by Mr. Adams, as Secretary of State, of an instruction to Mr. Rush announcing the President's intention at no remote period to recognize the govern-

Spanish-American  
states.

ment of Buenos Ayres. A question arose as to the form of recognition. Mr. Crawford said that if an acknowledgment was to take place he should prefer to make it, not by granting an exequatur to a consul, but by sending a minister there, because the Senate must then act upon the nomination, which would give their sanction to the measure. Mr. Wirt added that the House of Representatives must also concur by assenting to an act of appropriation. The President, laughing, said that as those bodies had the power of impeachment it would be convenient to have them thus pledged beforehand. Mr. Adams observed that his "impressions were altogether different. I thought it not consistent with our national dignity," said Mr. Adams, "to be the first in sending a minister to a new power. It had not been done by any European power to ourselves. \* \* \* As to impeachment, I was willing to take my share of risk of it for this measure whenever the Executive should deem it proper. And, instead of admitting the Senate or House of Representatives to any share in the act of recognition, I would expressly avoid that form of doing it which would require the concurrence of those bodies. It was, I had no doubt, by our Constitution an act of the Executive authority. General Washington had exercised it in recognizing the French Republic by the reception of Mr. Genest. Mr. Madison had exercised it by declining several years to receive, and by finally receiving, Mr. Onis; and in this instance I thought the Executive ought carefully to preserve entire the authority given him by the Constitution, and not weaken it by setting the precedent of making either House of Congress a party to an act which it was his exclusive right and duty to perform.

"Mr. Crawford said he did not think there was anything in the objection to sending a minister on the score of national dignity, and that there was a difference between the recognition of a change of government in a nation already acknowledged as sovereign, and the

recognition of a new nation itself. He did not, however, deny, but admitted, that the recognition was strictly within the powers of the Executive alone, and I did not press the discussion further."<sup>a</sup>

In his message of March 8, 1822, presenting the question of recognizing the "Spanish provinces in this hemisphere" to Congress, President Monroe stated that he did so in order that there might be "such cooperation between the two departments of the Government as their respective rights and duties may require." He then proceeded to express the opinion that "the provinces which have declared their independence and are in the possession of it ought to be recognized," and he concluded by saying: "Should Congress concur in the view herein presented, they will doubtless see the propriety of making the necessary appropriations for carrying it into effect."<sup>b</sup>

An appropriation of \$100,000 was made "for such missions to the independent nations of the American continent, as the President of the United States may deem proper."<sup>c</sup>

In his special message of December 21, 1836, President Jackson observed that a resolution, which had been introduced in the House of Representatives, "distinctly intimated that the expediency of recognizing the independence of Texas should be left to the decision of Congress. In this view, on the ground of expediency, I am," said President Jackson, "disposed to concur, and do not, therefore, consider it necessary to express any opinion as to the strict constitutional right of the Executive, either apart from or in conjunction with the Senate, over the subject." Congress, however, merely incorporated in the civil and diplomatic appropriations act of March 3, 1837, a provision "for the salary and outfit of a diplomatic agent to be sent to the Republic of Texas, whenever the President of the United States may receive satisfactory evidence that Texas is an independent power, and shall deem it expedient to appoint such minister."<sup>d</sup>

"What authority is to recognize \* \* \* a new government claiming to exist over an island, which constituted an integral part of the dominions of a sovereign, with whom our relations are of a friendly character? This act of high sovereign power, certainly can not without instructions, be performed by a consul, whose functions are purely commercial; and he ought never under any conceivable circumstances, to assume such a high responsibility. In the United States such a recognition is usually effected, either by a nomination to, and confirmation by the Senate of

<sup>a</sup> Memoirs of John Quincy Adams, IV. 205-206.

<sup>b</sup> Richardson, II. 116-118.

<sup>c</sup> "An act making an appropriation to defray the expenses of missions to the independent nations on the American continent." (3 Stat. 678.)

<sup>d</sup> 5 Stat. 170.

a Diplomatic or Consular agent to the new Government, or by an act of Congress. The latter course was adopted, in the recognition of the independence of the Spanish-American Republics."

Mr. Buchanan, Sec. of State, to Mr. Marston, consul at Palermo, Oct. 31, 1848, 10 MS. Dispatches to Consuls, 489.

The circumstances of this case are given, *supra*, 112-113. Mr. Buchanan, after the passage above quoted, expressly refers to the act of May 4, 1822, the terms of which have just been given. (*Supra*, 85, 243.)

"Should the new Government prove to be, in your opinion, firm and stable, the President will cheerfully recommend to Congress, at their next session, the recognition of Hungary, and you might intimate, if you should see fit, that the President would in that event be gratified to receive a diplomatic agent from Hungary in the United States by or before the next meeting of Congress, and that he entertains no doubt whatever that in case her new Government should prove to be firm and stable, her independence would be speedily recognized by that enlightened body."

**Mr. Mann's instructions.**

Mr. Clayton, Sec. of State, to Mr. Mann, special and confidential agent to Hungary, June 18, 1849, S. Ex. Doc. 43, 31 Cong. 1 Sess.

Wharton, *Int. Law Dig.*, I. 553, referring to this passage, says: "As to this it is to be remarked that while Mr. Webster, who shortly afterwards, on the death of President Taylor, became Secretary of State, sustained the sending of Mr. Mann as an agent of inquiry, he was silent as to this paragraph, and suggests, at the utmost, only a probable Congressional recognition in case the new Government should prove to be firm and stable."

It may also be observed that if Mr. Mann had found a Hungarian Government which he considered sufficiently established, and had presented himself to it officially, as he was authorized to do; and if, in addition to that, the President had, before the meeting of Congress, received a diplomatic agent from Hungary, it does not appear what would have been wanting, from the international point of view, to the recognition by the United States of Hungarian independence.

It was maintained by Mr. Seward that the recognition of revolutionary or reactionary governments belongs exclusively to the Executive, and can not be determined internationally by Congressional action.

**Position of Mr. Seward.**

Mr. Seward, Sec. of State, to Mr. Dayton, April 7, 1864, MS. Inst. France, XVII. 42.

That the power of recognition belongs exclusively to the Executive is maintained in: "Memorandum on the method of 'recognition' of foreign governments and foreign states by the Government of the United States, 1789-1897," S. Doc. 40, 54 Cong. 2 Sess.; "Memorandum upon the power to recognize the independence of a new foreign state," S. Doc. 56, 54 Cong. 2 Sess.

"It is for governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting."

**Decisions of the Courts.**



Marshall, C. J., *Rose v. Himely* (1808), 4 Cranch, 239, 272.

The same principle is laid down in *Gelston v. Hoyt*, 3 Wheat. 324; *The Nueva Anna*, 6 Wheat. 193; *Kennett v. Chambers*, 14 Howard, 38; *U. S. v. Pico*, 23 Howard, 326; *Jones v. United States* (1890), 137 U. S. 202, 212-213. In judicial proceedings involving the question of the existence of a particular government, the action of the Department of State "has been confined to furnishing, upon application of any court, a statement of the actual status of diplomatic relations between the United States and the government in question." (Mr. Foster, Sec. of State, to Señor Bolet Peraza, Venez. min., tel., Sept. 21, 1892, For. Rel. 1892, 644.)

That courts may take notice of existing sovereignties from the fact of their continuous existence in history, see *Consul of Spain v. The Conception*, 2 Wheel. Cr. Cas. 597; 1 Brunner, Col. Cas. 597; S. P., *The Maria Josepha*, 2 Wheel. Cr. Cas. 600; 1 Brunner, Col. Cas. 500. Compare *Williams v. Suffolk Ins. Co.*, 13 Pet. 415, affirming 3 Sumner, 270.

Where property, captured in the autumn of 1813, was claimed by a native of Buenos Aires, who carried on trade there with his father and sister as partners, and who had been "admitted a freeman of the new Government," which the United States had not recognized, he was accorded the rights of a Spanish subject, under the treaty between the United States and Spain of 1795.

*The Nereide* (1815), 9 Cranch, 388.

The course of the United States with reference to a revolted portion of a foreign nation is regulated and directed by the legislative and executive departments of the Government, and not by the judicial department. If the Government remains neutral, and recognizes the existence of a civil war, the courts can not consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy. The persons or vessels employed in the service of a territory whose belligerency has been recognized by this Government must be permitted to prove the fact of their being so employed by the same testimony as would be sufficient to prove that such person or vessel was employed in the service of an acknowledged state. The seal of such unacknowledged government can not be permitted to prove itself, but may be proved by such testimony as the nature of the case admits; and the fact that a person or vessel is in the service of such government may be proved without proving the seal.

*U. S. v. Palmer*, 3 Wheat. 610. See *the Estrella*, 4 Wheat. 298.

The Executive having recognized the existence of a state of war between Spain and her South American colonies, the courts of the union are bound to consider as lawful those acts which war authorizes, and which the new Governments in South America may direct against their enemy. Captures made under their commissions are to be treated by the courts as other captures, and their legality can not be determined unless they were made in violation of the neutral rights of the United States.

*Divina Pastora*, 4 Wheat. 52; *Josefa Segunda*, 5 Wheat. 338.

The courts follow the Executive in the recognition of belligerency, even in the cases of domestic insurrection.

The Prize Cases, 2 Black, 735; *U. S. v. Yorba*, 1 Wall. 412; *U. S. v. Hutchings*, 2 Wheel. C. C. 543; *The Hornet*, 2 Abbott (U. S.), 35; *U. S. v. Baker*, 5 Blatch. 6; 1 Brunner C. C. 489.

See also Dana's *Wheaton*, note, § 23, pp. 34, 36.

"It belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed."

The Three Friends (1897), 116 U. S. 1, 63. In this case the court followed the action of the Executive in recognizing a state of revolt or insurgency, as distinguished from belligerency, such appearing to be the Executive intention. See, particularly, *Underhill v. Hernandez* (1897), 168 U. S. 250.

## VII. CONTINUITY OF STATES.

### 1. TERRITORIAL CHANGES.

#### § 76.

Mere territorial changes, whether by increase or by diminution, do not, so long as the identity of the state is preserved, affect the continuity of its existence or the obligations of its treaties. Prussia, after the peace of Tilsit, in 1807, lost almost a third of its territory. The Kingdom of Saxony, by the treaty of Vienna, was reduced to a half of its previous dimensions. France, in 1815 and 1871, and Turkey, in 1829 and 1878, both were deprived of territory. Austria lost, in 1859, its richest province, Lombardy, and, in 1866, Venetia. In none of these cases was the continuity or the identity of the state destroyed, nor was the general force of its international obligations held to be impaired.

Martens, *Traité de Droit Int.*, I. § 68.

Rivier, *Principes du Droit des Gens*, I. 63-65.

### 2. CHANGES IN POPULATION.

#### § 77.

What has been said as to territorial changes applies also to changes in population. Population is incessantly renewed; and its numbers and racial character may be strongly modified, even without any gain or loss of territory. When the Great Elector received the Protestant French, the population of the countries which went to make up the Prussian monarchy acquired an element speaking a different language, and of great intellectual, moral, and numerical importance. From the point of view of international law, the states concerned suffered no

change. The case was the same with Geneva in the sixteenth century, and, in a different measure, at the end of the seventeenth and eighteenth centuries.

Rivier, *Principes du Droit des Gens*, I. 63-65.

### 3. POLITICAL CHANGES.

#### § 78.

Changes in the government or the internal polity of a state do not as a rule affect its position in international law. A monarchy may be transformed into a republic or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired. There may be produced, however, a change in rank, as by the conversion of a kingdom into a principality, or the reverse.

The principle of the continuity of states has important results. The state is bound by engagements entered into by governments that have ceased to exist; the restored government is generally liable for the acts of the usurper. The governments of Louis XVIII. and Louis Philippe so far as practicable indemnified the citizens of foreign states for losses caused by the government of Napoleon; and the King of the Two Sicilies made compensation to citizens of the United States for the wrongful acts of Murat.

Rivier, *Principes du Droit des Gens*, I. 62.

The full history of the French indemnities to citizens of the United States, under the conventions of 1803 and 1831, is given in Moore, *International Arbitrations*, V. 4399, 4447. The indemnities paid by France to other powers are noticed in the same volume, 4862.

The history of the indemnity made by the King of the Two Sicilies may also be found there, Chapter G, 4575, and, particularly, as to the principle of liability, 4576-4581.

The decisions of the commission under the Florida treaty upon questions as to the liability of Spain for the acts of the French in that country are given in the same volume, 4512 et seq.

“It may be true, as alleged by Baron de Damas, that the King of France, in reascending the throne, ‘could not take, nor has taken, the engagement to satisfy all the charges imposed on him as indemnity for the acts of violence and for the depredations committed by the usurping Government’ [of Napoleon]; and yet the obligations of France to redress those acts and depredations may be perfect. It is not necessary to discuss the question of usurpation which is put forward. It is sufficient for us that those acts and depredations proceeded from the actual Government of France; and that the responsibility of France to make reparations for wrongs committed under the authority of any form of government which she may have adopted, or to which she may have submitted, from time to time, can not be

contested. The King of France, in reascending the throne of his ancestors, assumed the government, with all the obligations, rights, and duties which appertain to the French nation. He can justly claim absolution from none of those obligations or duties. And our complaint is precisely, that he has *not* taken upon himself the engagement to make that indemnity to which American citizens are entitled in consequence of the wrongful acts committed under previous French Governments."

Mr. Clay, Sec. of State, to Mr. Brown, minister to France, May 28, 1827, H. Ex. Doc. 147, 22 Cong. 2 sess. 15-16.

The same principle is restated in Mr. Van Buren, Sec. of State, to Mr. Rives, minister to France, July 20, 1829, *id.* 18, 22-24; and by Mr. Rives, *id.* 180.

"When the allied powers of Europe overthrew the dynasty of Napoleon and restored to the countries which he had subdued their legitimate sovereigns, there were but two or three inferior states, and those in Germany, which attempted to deprive proprietors of domains acquired by them under the authority of their *de facto* rulers. Austria, Prussia, Russia, the Bourbon sovereigns in France and Italy, Sardinia, and the Pope, respected the law of reason, of justice, and of nations, and left undisturbed titles so acquired." (Phillimore, *Int. Law*, 2nd ed., III. 851.)

The same principle was laid down in the case of the Prince of Hesse Cassel in respect of debts, it being held that discharges of debts due to the prince given by Napoleon as *de facto* ruler of the country were valid. (Phillimore, *Int. Law*, 2nd ed., III. 841-849.)

"The origin and organization of government are questions generally of internal discussion and decision. Foreign powers deal with the existing *de facto* government, when sufficiently established to give reasonable assurance of its permanence, and of the acquiescence of those who constitute the state in its ability to maintain itself, and to discharge its internal duties and its external obligations.

"If the government which a people have placed in power, or have consented to its exercise of power, misbehave and violate or transcend their limited functions, it is the misfortune of those who have placed it in power or consented to its elevation and to its discharge of public trusts. Its misconduct should not be visited upon individuals who honestly enter into engagements with its official representatives. To admit this would destroy all security in such contracts or engagements and would necessarily destroy the credit of the state, while working grievous injustice to those who may be furnishing the very means for the conduct of the affairs of the government."

Mr. Fish, Sec. of State, to Mr. Bassett, minister to Hayti, Feb. 21, 1877, MS. Inst. Hayti, II., 91, referring to a legislative act of the existing Government of Hayti declaring the acts and engagements of the preceding administration invalid. Mr. Bassett was instructed to express to the Haytian Government, in advance of the possibility of a practical question arising, the hope that it would not insist upon the application of a principle which the United States could not but regard as being "in conflict with accepted law" and as "tending to injure the credit and the high sense of obligation" of Hayti.

"I have received your No. 138, of the 12th of August last, in which you report certain proceedings of the Peruvian Congress which seemed to cast a doubt upon the obligation of the present Government of Peru to keep engagements entered into by the Pierola and Iglesias Governments. Your apprehension that the present Government may contemplate a general denial of such obligations seems to have been aroused mainly by two bills introduced in the House of Deputies, one of which proposed to annul all appointments made in the judiciary departments under the Governments of Pierola and Iglesias, and the other to annul all interior or domestic acts of those Governments. The former bill, you state, has been passed by the House without discussion. The latter measure has not been acted on; but, inasmuch as if it should receive the approval of the Congress it might seriously affect extensive interests of citizens of the United States which have grown up under contracts with the Pierola and Iglesias Governments, especially in connection with the construction and operation of railways, you ask to be instructed as to the course you should pursue in the contingency you suggest.

"Upon the general question of the binding effect upon Peru of contracts made by the Pierola and Iglesias Governments in accordance with the constitution and laws of that country, the opinion of this Department is that the performance of such engagements is obligatory upon the present Peruvian Government; and that the attempt on the part of that Government to avoid such contracts, thus denying the capacity of the Pierola and Iglesias Governments to contract, in violation or disregard of the vested rights of citizens of the United States, would afford just ground for complaint. For the greater part of six years, from 1879 until 1885, either the Pierola or the Iglesias Government was recognized by foreign powers as the Government of Peru. The United States, in common with other nations maintaining diplomatic and commercial relations with that country, took no part in the civil conflict which raged from time to time during that period, but acted upon the principle of recognizing as the lawful Government of Peru that political organization which was able to maintain the diplomatic and commercial relations of the country with foreign nations. The acts of such a government are universally admitted as binding upon the country which it represents. This principle holds even where a change in the form of a government occurs; and it applies still more strongly where the change is merely in the personnel of the government. Contracts made by a government are to be regarded as the obligations of the nation it represents, and not as the personal engagements of the rulers. Hence, although the government may change the the people remain bound.

"It is hardly to be supposed that the Government of Peru would entertain a disposition to declare void all contracts made by the Pierola

and Iglesias Governments; and what is herein said on that subject is intended to inform you of the views of this Government upon the questions of international law which are involved, and not to direct you to take any anticipatory action.

"Any case arising in which American interests are found to be affected will require to be examined on its merits, to determine how far the general principle applies. But, as to the general principle, the present Government of Peru should know our position."

Mr. Bayard, Sec. of State, to Mr. Buck, minister to Peru, No. 97, Sept. 23, 1886, For. Rel. 1887, 921.

"I have received your No. 212, of February 28, containing correspondence in regard to the action of the Peruvian Congress 'declaring null all acts of the Piérola and Iglesias Governments.'

"The views of the Government of the United States having been announced as to the general principles involved in the assumptions of the Peruvian legislation, and exception in principle duly taken thereto, the matter may now rest, unless some specific case should arise affecting American interests and calling for renewed representations." (Same to same, No. 130, April 29, 1887, id. 934.)

"Government is constituted in Republic of the United States of Brazil. Monarchy deposed; imperial family left the country; provinces adhere; tranquillity and general satisfaction; executive power intrusted to Provisional Government, whose chief is Marshal Deodoro da Fonseca, and myself the minister of finance; Republic respects strictly all engagements and contracts entered upon by the state."

Telegram of Mr. Ruy Barbosa, minister of finance of Provisional Government of Brazil, communicated to Mr. Blaine, Sec. of State, Nov. 23, 1889, For. Rel. 1889, 70.

#### 4. SUSPENSION OF INDEPENDENCE.

#### § 79.

Under the convention of July 4, 1831, France paid the United States a sum of money in settlement of claims of citizens of the latter growing out of the acts of Napoleon. To the commissioners appointed to carry this convention into effect, claims were submitted for the seizure and the sequestration or confiscation of American vessels in Dutch ports in 1809 and 1810. When the United States pressed these claims against Holland in 1815, the Dutch Government denied its responsibility on the ground that when the seizures occurred the Netherlands were under the actual government of France. The discussion continued from time to time for five years. May 26, 1820, Mr. John Quincy Adams, as Secretary of State, instructed the minister of the United States at The Hague to forbear for the time to press the subject further. This step was taken at the request of the Dutch Government, made through its minister at Washington, that the claims be not further pressed. As demands against the Netherlands the claims

were thus practically abandoned. The commissioners under the convention with France decided that they constituted valid demands upon the French nation. The reasoning of the commissioners, as stated by one of their number, was as follows:

“Holland, after some ten years of political changes, during which though nominally independent she was tributary to all the projects of France, had received, in the month of June, 1806, a king of the Napoleon family. But it was manifest, that in placing Louis upon the throne, his brother had not renounced his control over the affairs of that country. The form of distinct sovereignties was presented to the public eye; but the energies of the Dutch people were directed more than ever to the advancement of the imperial policy. At last, in the concluding month of 1809, a new crisis approached. At a moment when the finances of Holland were in a state of extreme embarrassment, she was required to destroy her commerce with foreign nations, which formed the principal source of her revenues. Louis ventured to remonstrate, and delayed compliance with the mandate. He was reminded in reply, that the country of which he was sovereign was a French conquest, and that ‘his highest and imprescriptible duties were to the imperial crown;’ and it was announced to him, in terms which could not be mistaken, that the project of uniting Holland to the empire was already matured, and that its consummation could only be postponed by his unqualified obedience. Among the most decided, though not the first tests of his submission, as he has since declared to the world, ‘the pretended treaty of the 16th of March, 1810, which was in fact a capitulation, was presented to him to be ratified.’ ‘It was imposed,’ he adds, ‘by the emperor;’ and a prisoner as Louis was at the time at Paris, he had no choice but to yield. The French armies had forcibly possessed themselves beforehand of several of the Dutch fortresses; French officers of the customs occupied all the ports and outlets of the kingdom; and Napoleon, confounding apparently his purposes with their execution, had already directed his decrees to the authorities of Holland as if it was one of the departments of France. The assent of the king however did not avail to prolong his reign. The troops of his brother continued to advance, they menaced Amsterdam, the popular feeling was inflamed, and in the vain hope of averting a new revolution, Louis abdicated on the 1st of July in favour of his son. It was unnecessary; the emperor’s arrangements were already made; a decree of thirteen articles was issued on the 9th from the palace of Rambouillet, the first of which declared that Holland was united to the empire.

“The tenth article of the treaty of 16th March, 1810, was as follows: ‘All merchandise which has arrived in American vessels in the ports of Holland since the 1st of January, 1809, shall be placed under sequestration, and shall belong to France, to be disposed of according

to circumstances and to the political relations with the United States.' It was executed in the spirit which suggested it, rather than according to its terms; every American cargo, without reference to the date of its importation, was sequestered at once. Some were afterwards released under the decree of 9th July, 1810, or by special favour; but the greater number, after more or less delay, were sold by the imperial order, and their proceeds passed into the *caisse d'amortissement* at Paris.

"It was for the value of these cargoes that reclamations were made before the commissioners. The brief account which has been given of the political condition of Holland from the year 1809 till it was formally merged in the French empire sufficiently explains the reason for allowing them. Holland was already a dependent kingdom, and Louis a merely nominal sovereign. The treaty was a form; in substance it was an imperial decree."

Mr. Kane, one of the commissioners, quoted in Moore, *International Arbitrations*, V. 4473.

An illustration of the difference, as affecting the continuity of the state, between the actual suppression of independence, as in the case of the Netherlands, and the mere exercise of influence, however powerful it may be, by one state over another, is found not only in the case of the Two Sicilies under Murat, to which reference has been made above, but also in the case of Denmark. From 1807 to 1811, many American vessels were seized, and some of them were condemned by the Danes under decrees which were practically dictated by Napoleon. The claims growing out of these spoliations were pressed and finally settled as demands against Denmark. (Moore, *Int. Arbitrations*, V. 4549.) The commissioners under the convention between the United States and France of July 4, 1831, held that they could not be charged against the latter country, for, although the conduct of the King of Denmark may have been influenced by "his anxiety to conciliate the favor of the French emperor," the "act was his own: the Kingdom of Denmark was then, as now, independent." (Moore, *Int. Arbitrations*, V. 4475.)

See, also, as to the suspension of the independence of the Dutch, Davis' *Treaty Notes, Treaties and Conventions between the United States and other Powers, 1776-1887*, 1235.



## CHAPTER IV.

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Sovereignty may be gained or lost, as the case may be, (1) by the transfer of territory, (2) by revolution, or (3) by internal development. We may discuss these modes in their order and also the effects produced by a change of sovereignty.

I. *THE ACQUISITION OF TERRITORY.*

## 1. OCCUPATION.

Title by occupation is gained by the discovery, use, and settlement of territory not occupied by a civilized power. Discovery gives only an inchoate title, which must be confirmed by use or settlement.

## (1) DISCOVERY.

## § 80.

“On the discovery of this immense [American] continent the nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. . . . The potentates of the Old World found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the New, by bestowing on them civilization and Christianity, in exchange for unlimited independ-

ence. But, as they were nearly all in pursuit of the same object, it was necessary, in order to avoid conflicting settlements and consequent war with each other, to establish a principle which all should acknowledge as the law by which the rights of acquisition, which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it."

Marshall, C. J., *Johnson v. McIntosh* (1828), 8 Wheaton, 543.

See *supra*, § 16. See, also, Mr. Marcy, Sec. of State, to Mr. Thompson, Dec. 27, 1853, 42 MS. Dom. Let. 124.

The English possessions in America were not claimed by right of conquest, but of discovery, and were held by the King, as the representative of the nation, for whose benefit the discovery was made. When the Revolution took place, the people of each State, in their sovereign character, acquired the absolute right to all their navigable waters, and the soil with them.

The grant from Charles II to the Duke of York of the territory which now forms the State of New Jersey, passed to the Duke the soil under the navigable waters as one of the royalties incident to the powers of government, which were also granted, to be held by him in the same manner and for the same purposes as this soil had been previously held by the Crown, and the same is true of the grantees of the Duke. And when these grantees surrendered to the Crown all the powers of government, the title to the soil passed to the Crown, and at the Revolution became vested in the State of New Jersey.

*Martin v. Waddell*, 16 Peters, 367.

"How far the mere discovery of a territory which is either unsettled, or settled only by savages, gives a right to it, is a question which neither the law nor the usages of nations has yet definitely settled. The opinions of mankind, upon this point, have undergone very great changes with the progress of knowledge and civilization. Yet it will scarcely be denied that rights acquired by the general consent of civilized nations, even under the erroneous views of an unenlightened age, are protected against the changes of opinion resulting merely from the more liberal, or the more just, views of after times. The right of nations to countries discovered in the sixteenth century is to be determined by the law of nations as understood *at that time*, and not by the improved and more enlightened opinion of three centuries later."

Mr. Upshur, Sec. of State, to Mr. Everett, Oct. 9, 1843, MS. Inst. Great Britain, XV. 148, 149.

"The ground taken by the British Government, that a discovery made by a private individual, in the prosecution of a private enterprise, gives no right, cannot be allowed. There is nothing to support it, either in the reason of the case or in the law and usage of nations. To say the least of it, if a discovery so made confers no right, it prevents any other nation from acquiring a right by subsequent discovery, although made under the authority of Government, and with an express view to that object. In no just acceptance of the term can a country be said to be 'discovered,' if its existence has been previously ascertained by actual sight. This is a mere question of *fact*, which a private person can settle as well as a public agent. But be this as it may, Meares himself was but the agent of a private trading company, without any authority whatever from his Government, so that, in this respect, his discovery stands upon no better ground than that of Captain Gray."

Id. 165.

"Discovery alone is not enough to give dominion and jurisdiction to the sovereign or government of the nation to which the discoverer belongs; such discovery must be followed by possession. 'All mankind,' says that eminent and impartial writer on international law, Vattel, 'have an equal right to things that have not yet fallen into the possession of anyone, and those things belong to the person who first takes possession of them. When, therefore, a nation finds a country uninhabited and without an owner, it may lawfully take possession of it; and after it has sufficiently made known its will in this respect, it cannot be deprived of it by another nation.' 'Thus,' continues the learned author, 'navigators going on voyages of discovery, furnished with a commission from their sovereign, and meeting with islands or other lands in a desert state, have taken possession of them in the name of their nation, and this title has been usually respected, provided it was soon after followed by a real possession.' (Vattel, Ch. XVIII., page 98, Philadelphia edition, 1849.)"

Mr. Fish, Sec. of State, to Mr. Preston, Dec. 31, 1872, MS. Notes to Hayti, I. 125, 126.

"The right of discovery is not recognized in the Roman law unless followed by occupation, or unless the intention of the sovereign or state to take possession be declared or made known to the world. And it must be conceded that modern diplomatists and publicists incline to the opinion that mere transient discovery amounts to nothing unless followed in a reasonable time by occupation and settlement, more or less permanent, under the sanction of the state."

Mortimer v. N. Y. Elevated R. R. Co. (1889), 6 N. Y. Supp., 898.

"The fact that the discoveries of an American citizen first revealed the importance of the Congo country seems to justify this Government

in claiming a special influence upon the determination of the questions touching all foreign arrangements for the administration of that region, especially as to its commerce."

Mr. Frelinghuysen, Sec. of State, to Mr. Chandler, Nov. 22, 1884, 153 MS. Dom. Let. 267.

(2) SETTLEMENT.

§ 81.

"By the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation, as well as by cession and conquest; and when citizens or subjects of one nation, in its name, and by its authority or with its assent, take and hold actual, continuous and useful possession, (although only for the purpose of carrying on a particular business, such as catching and curing fish, or working mines,) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning guano islands. Vattel, lib. 1, c. 18; Wheaton on International Law (8th ed.) sections 161, 165, 176, note 104; Halleck on International Law (3d ed.) c. 6, sections 7, 15; 1 Phillimore on International Law (3d ed.) §§ 227, 229, 230, 232, 242; 1 Calvo Droit International (4th ed.) sections 266, 277, 300; Whiton v. Albany Ins. Co., 109 Mass. 24, 31."

Jones v. United States (1890), 137 U. S. 202, 212.

"The law of nations will not acknowledge the property and sovereignty of a nation over any uninhabited country, except where actual possession has been taken and settlement formed, or of which it makes actual use. 'When navigators,' says Vattel, 'have met with desert countries, in which those of other countries had, in their transient visits, erected some monument to show their having taken possession of them, they have paid as little regard to that empty ceremony as to the regulation of the Popes, who divided a great part of the world between the crowns of Castile and Portugal.' (Book 1, Chap. XVIII., Sec. 209.)"

Black, At.-Gen., 1859, 9 Op. 364, 368.

"Martens wrote in 1789 to the same effect [as Vattel, supra,] in his *Précis du droit des gens*, § 37; and so did Klüber in 1819 in his *Droit des gens*, § 126.

"The principle and rule to be deduced respecting title to unoccupied regions, or those in the possession of the aboriginal inhabitants, from the writings of the accepted teachers of public law, are that acquisition and title may be original and derivative; that original title includes discovery, use, and settlement, which are ingredients of occupation,

and will constitute a valid title, but that derivative title comes of conquest, treaty, and transfer. My opinion is that the English title to sovereignty and dominion in the province of New Netherlands and the colony of New York was not original in this sense, but was derivative from conquest."

Opinion of Mr. Sidney Webster on the law of marriage in New York in 1772.

The claim of the English to title to New York by discovery has been criticised on the ground that neither of the Cabots landed in or near New York or saw its coast. The courts of New York, however, hold that what the English did was sufficient to give them title by discovery, and that such a title is superior to the Indian title. These decisions proceed upon the theory that the claim of the Dutch to title by discovery was contested by the English from the start, and that the English finally made good their claim by the sword. For this reason it is held that neither the Dutch nor the Roman law ever prevailed in the State of New York *de jure*, but that the common law of England is the source of the local law. This doctrine is not affected by the cases in which the validity of Dutch grants has been upheld as between individuals.

Mortimer v. N. Y. Elevated R. R. Co. (1889), 6 N. Y. Supp. 898, citing Ketchum v. Buckley, 99 U. S. 188.

"Title by settlement, like title by discovery, is of itself an imperfect title, and its validity will be conditional upon the territory being vacant at the time of the settlement, either as never having been occupied, or as having been abandoned by the previous occupant. In the former case, it resolves itself into title by occupation; in the latter, the consent of the previous occupant is either expressed by some convention, or presumed from the possession remaining undisputed. \* \* \* The last settlement, when confirmed by a certain prescription, may found a good territorial title. Again, the presumption of law will always be in favor of a title by settlement. 'Commodum autem possidendi in eo est, quod, etiamsi ejus res non sit, qui possidet, si modo actor non potuerit suam esse probare, remanet suo loco possessio; propter quam causam, cum obscura sunt utriusque jura, contra petito rem judicari solet.' (Inst. Lib. iv., tit. 15, § 4.)

"Where title by settlement is superadded to title by discovery, the law of nations will acknowledge the settlers to have a perfect title; but where title by settlement is opposed to title by discovery, although no convention can be cited in proof of the discovery having been waived, still, a tacit acquiescence on the part of the nation that asserts the discovery, during a reasonable lapse of time since the settlement has taken place, will bar its claim to disturb the settlement."

Twiss, The Oregon Territory, 123-124. See, also, Wheaton, Elements, Part II., chap. iv, § 5.



“The principles which are applicable to the case are such as are dictated by reason, and have been adopted in practice by European powers, in the discoveries and acquisitions which they respectively made in the New

Extent of possession.

World: . . . The first of these is, that when any European nation takes possession of any extensive seacoast, that possession is understood as extending into the interior country, to the sources of the rivers emptying within that coast, to all their branches and the country they cover; and to give it a right, in exclusion of all other nations, to the same. . . . The second is, that, whenever one European nation makes a discovery, and takes possession of any portion of that continent, and afterwards another does the same at some distance from it, where the boundary between them is not determined by the principle above mentioned, the middle distance becomes such of course. . . . A third rule is, that, whenever any European nation has thus acquired a right to any portion of territory on that continent, that right can never be diminished or affected by any other power, by virtue of purchases made, by grants or conquests of the natives within the limits thereof.”

Messrs. C. Pinckney and Monroe, U. S. ministers, to Mr. Cevallos, Spanish Minister of State, April 20, 1805, Am. State Papers, For. Rel., II. 664, on the boundaries of the Louisiana territory. Adopted by Phillimore, Int. Law, I. § CCXXXVIII.; and by Field, Int. Code, 2nd ed., art. 75.

“The two rules generally, perhaps universally, recognized and consecrated by the usage of nations, have followed from the nature of the subject. By virtue of the first, prior discovery gave a right to occupy, provided that occupancy took place within a reasonable time and was ultimately followed by permanent settlements and by the cultivation of the soil. In conformity with the second, the right derived from prior discovery and settlement was not confined to the spot so discovered or first settled. The extent of territory which would attach to such first discovery or settlement might not in every case be precisely determined. But that the first discovery and subsequent settlement within a reasonable time, of the mouth of a river, particularly if none of its branches had been explored prior to such discovery, gave the right of occupancy and ultimately of sovereignty to the whole country drained by such river and its several branches, has been generally admitted. And in a question between the United States and Great Britain her acts have with propriety been appealed to as showing that the principles on which they rely accord with her own.”

Mr. Gallatin, U. S. plenipo., to Mr. Addington, British plenipo., Dec. 19, 1826, Am. St. Pap., For. Rel., VI. 667.

“That continuity furnishes a just foundation for a claim of territory.

*Continuity.* in connection with those of discovery and occupation, would seem unquestionable. It is admitted by all, that neither of them is limited by the precise spot discovered or occupied. It is evident that, in order to make either available, it must extend at least some distance beyond that actually discovered or occupied; but how far, as an abstract question, is a matter of uncertainty. It is subject, in each case, to be influenced by a variety of considerations. In the case of an island, it has been usually maintained in practice to extend the claim of discovery or occupancy to the whole; so likewise in the case of a river, it has been usual to extend them to the entire region drained by it, more especially in cases of a discovery and settlement at the mouth; and emphatically so when accompanied by exploration of the river and region through which it flows. Such, it is believed, may be affirmed to be the opinion and practice in such cases since the discovery of this continent. How far the claim of continuity may extend in other cases is less perfectly defined, and can be settled only by reference to the circumstances attending each. When this continent was first discovered, Spain claimed the whole, in virtue of the grant of the Pope; but a claim so extravagant and unreasonable was not acquiesced in by other countries, and could not be long maintained. Other nations, especially England and France, at an early period contested her claim. They fitted out voyages of discovery, and made settlements on the eastern coasts of North America. They claimed for their settlements, usually, specific limits along the coasts or bays on which they were formed; and, generally, a region of corresponding width extending across the entire continent to the Pacific Ocean. Such was the character of the limits assigned by England in the charters which she granted to her former colonies, now the United States, when there were no special reasons for varying from it. How strong she regarded her claim to the region conveyed by these charters and extending westward of her settlements, the war between her and France, which was terminated by the treaty of Paris, in 1763, furnishes a striking illustration. That great contest, which ended so gloriously for England, and effected so great and durable a change on this continent, commenced in a conflict between her claims and those of France, resting on her side on this very right of continuity, extending westward from her settlements to the Pacific Ocean; and, on the part of France, on the same right, but extending to the region drained by the Mississippi and its waters, on the ground of settlement and exploration. Their respective claims, which led to the war, first clashed on the river Ohio, the waters of which the colonial charters, in their western extension, covered; but which France had been unquestionably the first to settle and explore. If the relative strength of these different claims may be tested by the result of that remark-

able contest, that of continuity westward must be pronounced to be the stronger of the two. England has had at least the advantage of the result, and would seem to be foreclosed against contesting the principle, particularly as against us, who contributed so much to that result, and on whom that contest and her example and pretensions, from the first settlement of our country, have contributed to impress it so deeply and indelibly. But the treaty of 1763, which terminated that memorable and eventful struggle, yielded, as has been stated, the claims and all the chartered rights of the colonies beyond the Mississippi."

Mr. Calhoun, Sec. of State, to Mr. Pakenham, British minister, Sept. 3, 1844, touching the question of title to Oregon: S. Ex. Doc. 1, 29 Cong. 1 sess. 149; H. Ex. Doc. 2, 29 Cong. 1 sess. 149; Calhoun's Works, V. 432.

- . Hall, in his work on International Law (4th ed., 110-111, note), questions the accuracy of Mr. Calhoun's statement that Great Britain, before the peace of 1763, maintained against France the pretension that the limits of the English settlements extended across the entire continent, and suggests that the statement had "no better ground than the fact that English colonial grants were made without interior limits—a fact which by itself is of no international value." It is no doubt true that a pretension by a single power inconsistent with the rules of international law possesses little, if any, international value; but when the learned author spoke of the English colonial grants as being "without interior limits," he seems to have labored under the impression that their westerly extension was merely indefinite. In reality, they were expressly declared to traverse the continent. The patent granted by James I., Nov. 3, 1620, to the Plymouth Company, reached "from sea to sea." The charter of Massachusetts Bay, March 4, 1628, purported to operate "from the Atlantick and Western Sea and Ocean on the east parte to the South Sea on the west parte." The old patent for Connecticut, as well as the new charter of 1662, contained similar words, as did also the grants of Carolina (1663) and Georgia (1764). (Papers relating to the Treaty of Washington, V. 5, 21-22.)

See, as to the settlement of the Oregon question, Moore, *Int. Arbitrations*, I., Chap. vii., 196 et seq.

The question of a claim of title on the ground of contiguity "may be regarded as generally defined by the celebrated correspondence of Mr. Webster with the Peruvian Government, in 1852, in the Lobos Islands controversy, in which Mr. Webster laid down the proposition that inasmuch as according to 'the well-settled rule of modern public law, the right of jurisdiction of any nation whose territories may border on the sea, extends to the distance of a cannon-shot, or three marine miles from the shore, this being the supposed limit to which a defence of the coast from the land can be extended,' the whole discussion must turn upon this, viz: 'The Lobos Islands lying in the open ocean, so far from any continental possessions of Peru as not to belong to that country by the law of proximity or adjacent position, has the Government of that country exercised such unequivocal acts of absolute sovereignty and ownership over them as

to give her a right to their exclusive possession, as against the United States and their citizens, by the law of undisputed possession?' . . .

"The Peruvian Government proved that . . . its right to the islands rested . . . upon substantial and unequivocal acts of jurisdiction and possession exercised over them from time immemorial. It was ascertained . . . that as early as 1590 the people were in the habit of taking guano from the islands off the coast, and that the territory had been, by public decree, specifically annexed to the provinces or districts of the Republic. . . .

"It appeared . . . that Lord Palmerston had suggested, in 1834, that the proximity of the islands to Peru would give her a *prima facie* claim to them. Mr. Webster said no, however, and that it was *certain* that any such view was incorrect, because the distance of the Lobos Islands from the shore of Peru was 'five or six times greater than the three marine miles extend.' . . .

"In the Aves Island case, the United States insisted, in the same way, that it should be shown affirmatively that Venezuela constantly maintained such territorial sovereignty and possession of the island as other governments and their citizens were bound to respect. (Aves Island case, S. Ex. Doc. 10, 36 Cong. 2 sess. 225.) . . .

"The island of Navassa, said to be somewhere from 27½ to 35 miles from the southwest part of Hayti, was explored in July, 1857, by citizens of the United States, who discovered that it contained deposits of guano, and the United States asserted a right to the territory under the act of 1856. . . . It was firmly maintained by Mr. Fish [in a note to the Haytian minister of Dec. 31, 1872] that as Hayti was unable to show an *actual possession and use* of the island, or an extension and exercise of jurisdiction and authority over it, before the discovery of guano by the Americans, in 1857, her pretension of proprietorship of, and sovereignty over, the island was inadmissible, and that the absence of proof of such acts on her part could not be supplied by the fact of the proximity of the island to her territory, and that the island had, up to the date of the recent discovery, remained a wilderness. Mr. Fish said: 'The utmost to which the argument in her behalf amounts to, is a claim to a *constructive* possession, or rather to a right of possession; but in contemplation of international law such claim of a right to possession is not enough to establish the right of a nation to exclusive territorial sovereignty. (Citing Vattel, Bk. 1, chap. xviii, sec. 208.) Although fifteen years have elapsed since Duncan and Cooper discovered and settled upon the island, no evidence has been adduced by Hayti going to establish the affirmative proposition of its ever having been occupied, or even showing any act of positive jurisdiction ever having been exercised over it by that government.' . . .

"The Haytian minister having recurred again to the cases of Alta Vela and Cayo Verde, Mr. Fish, in his second note of the 10th of June,

1873, disposed of that part of the argument in this way: ‘. . . In the case of *Alta Vela* it was shown to have been included by name within a political and also within a judicial district of San Domingo. . . . As to *Cayo Verde*, both occupancy and jurisdiction were shown to have been exercised on that island by the local authorities of Jamaica long previous to the discovery of guano on it by citizens of the United States. . . . The exercise of jurisdiction is one of the highest evidences of sovereignty; the extension of the laws of an empire over a colonial possession forms one of the chief muniments of the nation’s title to sovereignty over the colony; and the absence of these important links in the chain of testimony advanced in support of Hayti’s claim to sovereignty over *Navassa*, must, I submit, appear to any reasonable mind fatal to that claim, nor can this absence be supplied by the facts of contiguity, or that *Navassa* had, up to the date of *Peter Duncan’s* discovery, remained a wilderness.’”

Brief of J. Hubley Ashton, Esquire, Counsel for the United States, in the case of *Gowen and Copeland v. Venezuela*, No. 16, U. S. and Venezuelan Claims Commission, convention of Dec. 5, 1885.

See *Moore, Int. Arbitrations*, IV. 3354.

An examination of the older cases, in which title rests upon occupation, will show that in most of them “the acts relied upon as giving title, previously to the actual plantation of a colony, have been scattered at somewhat wide intervals over a long space of time. Until recently this has been natural, and indeed inevitable. When voyages of discovery extended over years, when the coasts and archipelagoes lying open to occupation seemed inexhaustible in their vastness, when states knew little of what their own agents or the agents of other countries might be doing, and when communication with established posts was rare and slow, isolated and imperfect acts were properly held to have meaning and value. . . . But of late years a marked change has occurred. Except in some parts of the interior of Africa, there are few patches of the earth’s surface the ownership of which can be placed in doubt. . . . A tendency has consequently declared itself to exact that more solid grounds of title shall be shown than used to be adopted as sufficient. The most notable evidence of this tendency is afforded by the declaration adopted at the Berlin Conference of 1885. By that declaration Austria, Belgium, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Sweden and Norway, Turkey, and the United States agreed that ‘any power which henceforth takes possession of a tract of land on the coasts of the African continent outside of its present possessions, or which, being hitherto without such possessions, shall acquire them, as well as the power which assumes a protectorate there, shall accompany the respective act with a notification thereof, addressed to

**Berlin declaration.**

the other signatory powers of the present act, in order to enable them, if need be, to make good any claims of their own,' and 'the signatory powers of the present act recognize the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African continent sufficient to protect existing rights, and, as the case may be, freedom of trade and transit under the conditions agreed upon.' . . . The declaration, it is true, affects only the coasts of the continent of Africa; and the representatives of France and Russia were careful to make formal reservations directing attention to this fact; the former, especially, placing it on record that the island of Madagascar was excluded. Nevertheless, an agreement, made between all the states which are likely to endeavor to occupy territory, and covering much the largest spaces of coast which, at the date of the declaration, remained unoccupied in the world, can not but have great influence upon the development of a generally binding rule."

Hall, *Int. Law*, 4th ed. 118-119.

Numerous notifications relating to new acquisitions or to the delimitation of territory or of spheres of influence have been given under the Berlin declaration. (See *For. Rel.* 1885, 389, 390, 441-442; *For. Rel.* 1888, II. 1058.)

The subject is fully examined by Westlake, *Int. Law*, 155 et seq.

In several recent cases notifications of claims and acquisitions have been given voluntarily in respect of territories not within the Berlin declaration.

The general act of the Berlin Conference, in which the declaration appears, was not submitted to the Senate of the United States, and the United States Government did not become a party to it; but it is not understood that this was due to any objection to the attempt to substitute a real for a merely constructive occupation. (*For. Rel.* 1885, 442.)

By the protocol of March 7, 1885, between Germany, Great Britain, and Spain, the two former powers recognized "the sovereignty of Spain over the places effectively occupied, as well as over those that are not yet so, of the Sulu Archipelago." (*Br. and For. State Papers*, LXXVI. 58.) As to the British protectorate over Amatongaland, see *For. Rel.* 1895, I. 721; over Cook's Island, *For. Rel.* 1889, 485; and over Zanzibar, *For. Rel.* 1890, 476. As to the Spanish protectorate on the west coast of Africa, between Western Bay and Cape Bajador, see *For. Rel.* 1885, 769. For the notice of France's assumption of sovereignty over the country of the Ouatchis, in Africa, see *For. Rel.*, 1885, 389. As to Portugal's renunciation of her protectorate over the coast of Dahomey, see *For. Rel.* 1888, II. 1390. Notice was given by Italy Aug. 7, 1888, of the establishment of a protectorate over Zoula, in Africa. (*For. Rel.* 1888, II. 1058.)

As to the recognition by Sultan Osman Máhmud of an Italian protectorate over Somaliland, see *For. Rel.* 1901, 299.

"It can not be irrelevant to remark that 'spheres of influence' and the theory or practice of the 'Hinterland' idea are things unknown to international law and do not as yet rest upon any recognized principles of either international or municipal law. They are new departures which certain great European powers have found necessary and con-

venient in the course of their division among themselves of great tracts of the continent of Africa, and which find their sanction solely in their reciprocal stipulations. . . . Whether the 'spheres of influence' and the 'Hinterland' doctrines be or be not intrinsically sound and just, there can be no pretense that they apply to the American continents or to any boundary disputes that now exist there or may hereafter arise. Nor is it to be admitted that, so far as territorial disputes are likely to arise between Great Britain and the United States, the accepted principles of international law are not adequate to their intelligent and just consideration and decision. For example, unless the treaties looking to the harmonious partition of Africa have worked some change, the occupation which is sufficient to give a state title to territory can not be considered as undetermined. It must be open, exclusive, adverse, continuous, and under claim of right. It need not be actual in the sense of involving the *possessio pedis* over the whole area claimed. The only possession required is such as is reasonable under all the circumstances—in view of the extent of territory claimed, its nature, and the uses to which it is adapted and is put—while mere constructive occupation is kept within bounds by the doctrine of contiguity."

Mr. Olney, Sec. of State, to Sir Julian Pauncefote, British ambassador, June 22, 1896, For. Rel. 1896, 232, 235.

## 2. ACCRETION.

### § 82.

"When the ship was brought into this country a claim was given of a grave nature, alleging a violation of the territory of the United States of America. . . . The capture was made, it seems, at the mouth of the Mississippi River, and, as it is contended in the claim, within the boundaries of the United States. We all know that the rule of law on this subject is 'terræ dominium finitur, ubi finitur armorum vis,' and since the introduction of firearms that distance has usually been recognized to be about three miles from the shore. But it so happens in this case that a question arises as to what is to be deemed the shore, since there are a number of little mud islands composed of earth and trees drifted down by the river, which form a kind of portico to the mainland. It is contended that these are not to be considered as any part of the territory of America, that they are a sort of 'no man's land,' not of consistency enough to support the purposes of life, uninhabited, and resorted to only for shooting and taking birds' nests. . . . I am of a different opinion; I think that the protection of territory is to be reckoned from these islands; and that they are the natural appendages of the coast on which they border, and from which indeed they are formed. Their elements are derived

immediately from the territory, and on the principle of alluvium and increment, on which so much is found in the books of law. *Quod vis fluminis de tuo prædio detraxerit, and vicino prædio attulerit, palam tuum remanet*, even if it had been carried over to an adjoining territory. . . . Whether they are composed of earth or solid rock will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil."

Sir W. Scott, *The Anna* (1805), 5 C. Rob. 373.

As to land submerged by the gradual advance of the sea, see *Wilson v. Shiveley*, 11 Oregon, 215; and, as to land regained by recession of the sea, see *Ocean City Assoc. v. Shriver* (N. J. 1900), 46 Atl. Rep. 690; *Mulry v. Norton*, 100 N. Y. 424, 53 Am. Rep. 206; *Wallace v. Driver*, 61 Ark. 429.

That title by accretion applies to gradual increase by wrongful deposit by human hands was asserted in *Steers v. Brooklyn*, 101 N. Y. 51.

In 1851 a fractional section of land in Iowa was surveyed by United States surveyors and a part thereof designated as lot 4 containing 37.24 acres, the northern boundary being the Missouri River. In 1853 the lot was entered and paid for, and a patent was obtained for it in 1855. Between that time and 1888 it was subject to ten conveyances, and in each case it was described as lot 4. About 1853 new land began to form along the whole of the river line, and the increase continued until 1870, when it amounted to about forty acres, which continued to be a part of the lot. The new land was formed by the operation of the current and waters of the river washing and depositing earth, sand, and other material upon the lot, while the waters and current of the river receded so that the new land became high and dry above the usual high-water mark, the river making for itself a main course far north of the original meander line. This process, begun in 1853 and continued until 1870, went on so slowly that it could not be observed in its progress; but, at intervals of less than three or four months, it could be seen by the eye that additions greater or less had been made to the shore. *Held*, that, under the conveyances above referred to, in which no interest of any kind was reserved, the accretions passed with the lot as part thereof, and that it was properly alleged that the new land was formed "by imperceptible degrees," and that the general law of accretion, which had been held to be applicable to the Mississippi River, was also applicable to the Missouri River, although the changes in the latter were greater and more rapid than in the former, the difference not being so great as to render the law of accretion inapplicable. The court cited *County of St. Clair v. Livingston*, 23 Wall. 46, to the effect that "alluvion meant the addition to riparian land, gradually and imperceptibly made, through causes either natural or artificial, by the water to which the land was contiguous; that the test of what was gradual and imperceptible was that, although the witnesses might see from time to time that progress had been



made, they could not perceive it while the process was going on, and that it was alluvion whether the addition was made on a stream which overflowed its banks or on one which did not."

*Jefferis v. East Omaha Land Co.* (1890), 134 U. S. 178, 191, citing *Jones v. Soulard*, 24 Howard, 41; *Saulet v. Shepherd*, 4 Wallace, 502; *County of St. Clair v. Lovington*, 23 Wallace, 46; *Institutes of Gaius*, Book II. sec. 70; and various English cases.

Title by accretion may be maintained in respect of an island or dry land gradually formed upon that part of the bed of a river which is owned in fee by the riparian proprietor, who in such case retains title to the land previously owned by him together with the new deposit thereon.

But the formation of a bar at the foot of an island in a river by the transfer of a quarter of a mile of land in a single night does not confer a title by accretion; nor can the right of accretion to an island in a river be so extended lengthwise of the stream as to exclude riparian proprietors as such, above or below the island, from access to the river.

*St. Louis v. Rutz* (1891), 138 U. S. 226, 245, 250, 251.

To a movable island, traveling for more than a mile and from one State to another, title by accretion does not arise, since its progress is not imperceptible in the legal sense.

*St. Louis v. Rutz* (1891), 138 U. S. 226, 251.

This decision related to Arsenal Island, the subject of the case of *Carrick v. Lamar*, 116 U. S. 423, in which the island was described as "a mere moving mass of alluvial deposits." See, further, as to islands formed in navigable waters, *Cox v. Arnold*, 129 Mo. 337; *McBaine v. Johnson*, 155 Mo. 191, 55 S. W. 1031; *Moore v. Farmer*, 156 Mo. 33, 56 S. W. 493; *Perkins v. Adams*, 33 S. W. 778; *Tracy v. Railroad Co.*, 39 Conn. 382; *Railroad v. Schurmeir*, 7 Wall. 272.

By the act of August 4, 1846, 9 Stats. at L. 52, the western boundary of Iowa was declared to be "the middle of the main channel of the Missouri River;" by the act of April 19, 1864, the eastern boundary of Nebraska was declared to be the same channel, or, in the words of the statute, "the middle of the channel of said Missouri River." (13 Stats. at L. 47.) Between 1851 and 1877 there occurred in the course of the channel various changes, in consequence of which the State of Nebraska filed an original bill in the Supreme Court of the United States against the State of Iowa for the purpose of having the question, as to the effect of these changes on the common boundary, determined.

The court, Brewer, J., delivering the opinion, observed that it was "settled law, that when grants of land border on running water, and the banks are changed by that gradual process known as accretion, the

riparian owner's boundary line still remains the stream, although, during the years, by this accretion, the actual area of his possessions may vary" (New Orleans *v.* United States, 10 Pet. 662, 717; Jones *v.* Souland, 24 How. 41; Banks *v.* Ogden, 2 Wall. 57; Saulet *v.* Shepherd, 4 Wall. 502; St. Clair County *v.* Lovingson, 23 Wall. 46; Jefferis *v.* East Omaha Land Co., 134 U. S. 178), and that it was "equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel [which is termed in law 'avulsion'] works no change of boundary," the boundary remaining as it was, "in the center of the old channel, although no water may be flowing therein" (Gould on Waters, § 159; 2 Bl. Com. 262; Angell on Water Courses, § 60; Trustees of Hopkins' Academy *v.* Dickinson, 9 Cush. 544; Bittenuth *v.* St. Louis Bridge Co., 123 Illinois, 535; Hagan *v.* Campbell, 8 Porter (Ala.), 9; Murry *v.* Sermon, 1 Hawks (N. C.), 56); and that these propositions were "universally recognized . . . where the boundaries between States or nations are, by prescription or treaty, found in running water" (quoting, at great length, the opinion of Attorney-General Cushing, 8 Op. 175, 176).

It was contended, however, that the law of accretion was not applicable to the Missouri River.

The court replied that the contrary had already been decided, in a question between individuals, touching claims in the very place in controversy, in Jefferis *v.* Land Company, 134 U. S. 178, 189, and that this decision applied to the pending case. "The Missouri River," said the court, "is a winding stream, coursing through a valley of varying width, the substratum of whose soil, a deposit of distant centuries, is largely of quicksand. . . . The current is rapid, far above the average of ordinary rivers; and by reason of the snows in the mountains there are two well-known rises in the volume of its waters, known as the April and June rises. The large volume of water pouring down at the time of these rises . . . has great and rapid action upon the loose soil of its banks. . . . Frequently . . . the washing out of the underlying sand causes an instantaneous fall of quite a length and breadth of the superstratum of soil into the river; so that it may, in one sense of the term, be said that the diminution of the banks is not gradual and imperceptible, but sudden and visible. Notwithstanding this, two things must be borne in mind, . . . that, while there may be an instantaneous and obvious dropping into the river of quite a portion of its banks, such portion is not carried down the stream in a solid and compact mass, but disintegrates and separates into particles of earth borne onward by the flowing water, and giving to the stream that color which . . . has made it known as the 'muddy' Missouri; and, also, that while the disappearance, by reason of this process, of a mass of bank may be sudden and

obvious, there is no transfer of such a solid body of earth to the opposite shore, or anything like an instantaneous and visible creation of a bank on that shore. The accretion, whatever may be the fact in respect to the diminution, is always gradual and by the imperceptible deposit of floating particles of earth. . . . There is no heaping up at an instant, and while the eye rests upon the stream, of acres or rods on the forming side of the river. No engineering skill is sufficient to say where the earth in the bank washed away and disintegrating into the river finds its rest and abiding place. . . . The only thing which distinguishes this river from other streams, in the matter of accretion, is in the rapidity of the change caused by the velocity of the current; and this in itself, in the very nature of things, works no change in the principle underlying the rule of law in respect thereto.

. . . The boundary, therefore, between Iowa and Nebraska is a varying line, so far as affected by these changes of diminution and accretion in the mere washing of the waters of the stream.

“It appears, however, from the testimony, that in 1877 the river above Omaha, which had pursued a course in the nature of an ox-bow, suddenly cut through the neck of the bow and made for itself a new channel. This does not come within the law of accretion, but of that of avulsion. By this selection of a new channel the boundary was not changed, and it remained as it was prior to the avulsion, the center of the old channel; and that, unless the waters of the river returned to their former bed, became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel.”

*Nebraska v. Iowa* (1892), 143 U. S. 359, 368. The court, besides quoting the opinion of Attorney-General Cushing, quoted Vattel, Book 1, ch. 22, §§ 268, 269, 270.

### 3. Cession.

The effects of a cession of territory are determined by the instrument by which it is made, and by such principles of international and constitutional law as may be applicable to the case.

The effect of the transfer of sovereignty on the national status of the inhabitants of the ceded territory is discussed in the chapter on nationality.

The effect of a change of sovereignty on treaty relations is discussed in the chapter on treaties.

“The Constitution confers absolutely on the Government of the Union the power of making war and of making treaties; consequently, that Government possesses the power of acquiring territory, either by conquest or by treaty.”

*Marshall, C. J., American Insurance Co. v. Canter* (1828), 1 Peters, 511.

## (1) CONSENT OF THE POPULATION.

## § 83.

"The principle that the wishes of a population are to be consulted when the territory which they inhabit is ceded has not been adopted into international law, and can not be adopted into it until title by conquest has disappeared."

Hall, *Int. Law*, 4th ed. 49. See this author's discussion of the question, *id.* 48-50.

"Before passing in review the objections which you, under instructions from Count Okuma, renew to the proposed annexation [of the Hawaiian Islands to the United States], I desire to notice a declaration in the opening of your note which can not be passed over in silence. In referring to the sentiments of the population of Hawaii, you say: 'It is understood that only a small fraction of their number favor annexation.' You omit to state how this understanding has been ascertained, nor is it clear what is the purpose for which the statement is introduced.

"It can not be that one so well informed in the history of international relations as Count Okuma could have wished to suggest thereby the propriety of appealing from the action of the Government to 'the population.' In international comity and practice the will of a nation is ascertained through the established and recognized government, and it is only through it that the nation can speak. This is shown in the relations of the United States with Japan. The first intercourse of this Government with the Empire was had, with an authority which held a divided, if not disputed, sovereignty. Later, when all power and legislation was centered in the Emperor, this Government recognized him as the sole exponent of the public will. When parliamentary government was established the changed relation was accepted by the United States. No inquiry was thought proper to ascertain whether these various changes received the sanction of 'the population.' The present Government of the Hawaiian Islands, recognized by Japan and other countries, has been in existence for a series of years, during which time public peace and social order have been maintained, and the country has enjoyed an era of unprecedented prosperity. The Government of the United States sees no reason to question its complete sovereignty, or its right to express the national will."

Mr. Sherman, Sec. of State, to Mr. Toru Hoshi, Jap. min., Aug. 14, 1897, MS. Notes to Jap. Leg. I. 533, 535.

## (2) PROTECTION OF TERRITORY PENDING ANNEXATION.

## § 84.

"In answer to the resolution of the Senate of the 13th instant requesting to be informed 'whether, since the commencement of the

negotiations which resulted in the treaty now before the Senate for the annexation of Texas to the United States, any military preparation has been made or ordered by the President for or in anticipation of war, and, if so, for what cause, and with whom was such war apprehended, and what are the preparations that have been made or ordered; has any movement or assemblage or disposition of any of the military or naval forces of the United States been made or ordered with a view to such hostilities; and to communicate to the Senate copies of all orders or directions given for any such preparation or for any such movement or disposition or for the future conduct of such military or naval forces.' I have to inform the Senate that, in consequence of the declaration of Mexico communicated to this Government and by me laid before Congress at the opening of its present session, announcing the determination of Mexico to regard as a declaration of war against her by the United States the definitive ratification of any treaty with Texas annexing the territory of that Republic to the United States, and the hope and belief entertained by the Executive that the treaty with Texas for that purpose would be speedily approved and ratified by the Senate, it was regarded by the Executive to have become emphatically its duty to concentrate in the Gulf of Mexico and its vicinity, as a precautionary measure, as large a portion of the home squadron, under the command of Captain Conner, as could well be drawn together, and at the same time to assemble at Fort Jesup, on the borders of Texas, as large a military force as the demands of the service at other encampments would authorize to be detached. For the number of ships already in the Gulf and the waters contiguous thereto and such as are placed under orders for that destination, and of troops now assembled upon the frontier, I refer you to the accompanying reports from the Secretaries of the War and Navy Departments. It will also be perceived by the Senate, by referring to the orders of the Navy Department which are herewith transmitted, that the naval officer in command of the fleet is directed to cause his ships to perform all the duties of a fleet of observation and to apprise the Executive of any indication of a hostile design upon Texas on the part of any nation pending the deliberations of the Senate upon the treaty, with a view that the same should promptly be submitted to Congress for its mature deliberation. At the same time it is due to myself that I should declare it as my opinion that the United States having by the treaty of annexation acquired a title to Texas which requires only the action of the Senate to perfect it, no other power could be permitted to invade and by force of arms to possess itself of any portion of the territory of Texas pending your deliberations upon the treaty without placing itself in a hostile attitude to the United States and justifying the employment of any military means at our disposal to drive back the invasion. At the same time, it is my opinion that Mexico or any other power will find in your approval of the

treaty no just cause of war against the United States, nor do I believe that there is any serious hazard of war to be found in the fact of such approval. Nevertheless, every proper measure will be resorted to by the Executive to preserve upon an honorable and just basis the public peace by reconciling Mexico, through a liberal course of policy, to the treaty."

President Tyler, special message of May 15, 1844, S. Doc. 341, 28 Cong. 1 sess. 74-81. Both the message and the accompanying papers are given in the document here cited. The message itself may be found in Richardson, *Messages and Papers of the Presidents*, IV. 316.

See Benton's *Thirty Years' View*, II. 642, 643; Cong. Globe, 42 Cong. 1 sess. (1871), part 1, p. 294 et seq.

The treaty of annexation, which was signed at Washington April 12, 1844, was rejected by the Senate. This was followed by the adoption by Congress of the joint resolution of March 1, 1845, looking to the admission of Texas as a State into the Union, an end consummated by the joint resolution of Dec. 29, 1845. (*Infra*, § 103.)

In connection with President Tyler's message, *supra*, it may be stated that on January 17, 1844, Mr. Van Zandt, *chargé d'affaires* of Texas, inquired of Mr. Upshur, then Secretary of State of the United States, whether, if a treaty for the annexation of Texas to the United States should be signed, the President of the United States would, pending its ratification, give to Texas, if the latter should desire it, the protection of the military and naval forces of the United States. Mr. Van Zandt referred to the fact that an armistice had been proclaimed between Mexico and Texas and suggested the possibility of its termination by Mexico, should a treaty of annexation to the United States be concluded.

No answer was made to this inquiry by Mr. Upshur; but it appears that, in response to a similar inquiry, assurances such as were desired were immediately given by Mr. Murphy, United States *chargé d'affaires* in Texas, to the Government of that Republic on his own responsibility. Mr. Murphy also sent a secret "order" to Lieutenant Davis, U. S. S. *Flirt*, to advise any United States vessels of war which he might fall in with that they probably would soon be directed to assemble in the Gulf of Mexico, and to prevent any invasion of the Texan coast which might be meditated by Mexico or by any power giving her aid.

March 11, 1844, Mr. Nelson, who, on the death of Mr. Upshur, was acting as Secretary of States *ad interim*, informed Mr. Murphy that the President perceived with regret that he had given pledges which were beyond the line of his instructions and which committed the President to measures for which he had no constitutional authority to stipulate. The employment of the Army or Navy against a foreign power with which the United States was at peace, said Mr. Nelson, "is not within the competency of the President; and whilst he is not indisposed, as a measure of prudent precaution, and as preliminary to the proposed negotiation, to concentrate in the Gulf of Mexico, and on the southern borders of the United States, a naval and military force to be directed to the defense of the inhabitants and territory of Texas at a proper time, he can not permit the authorities of that Government or yourself to labor under the misapprehension that he has power to employ them at the period indicated by your stipulations . . . In any emergency that may occur, care will be taken that the commanders of the naval and military forces of the United States shall be properly

instructed . . . I am happy, however, to believe that no exigency, requiring the use of force, by the United States, against Mexico or any other power, is likely to result from the negotiation with Texas." Mr. Murphy was directed to countermand his instructions to Lieutenant Davis so far as they conflicted with these views.

Subsequently, on April 11, 1844, Mr. Calhoun, who had then become Secretary of State, replied to Mr. Van Zandt's note of the 17th of January, as follows: "I am directed by the President to say that the Secretary of the Navy has been instructed to order a strong naval force to concentrate in the Gulf of Mexico, to meet any emergency; and that similar orders have been issued by the Secretary of War to move the disposable military forces on our southwestern frontier for the same purpose. Should the exigency arise to which you refer in your note to Mr. Upshur, I am further directed by the President to say that, during the pendency of the treaty of annexation, he would deem it his duty to use all the means placed within his power by the Constitution to protect Texas from all foreign invasion." (S. Doc. 349, 28th Cong. 1st sess. 11.)

"In regard to the orders which have been heretofore given to the officers in command of the military and naval force of the United States in the Gulf of Mexico and on the frontiers of Texas, you may assure the Government of Texas that there will be no material change, except that the communications made to it by the officer commanding the military as well as the naval force, will be made through the *chargé d'affaires* of the United States."

Mr. Calhoun, Sec. of State, to Mr. Howard, *chargé d'affaires* to Texas, June 18, 1844, MS. Inst. Texas, I. 100.

The Mexican minister at Washington having protested, in the name of his Government, against the joint resolution of March 1, 1845, for the annexation of Texas, as a violation of the rights of Mexico, and having in consequence of it demanded his passports, "he was informed that the Government of the United States did not consider this joint resolution as a violation of any of the rights of Mexico, or that it afforded any just cause of offense to his Government; that the Republic of Texas was an independent power, owing no allegiance to Mexico, and constituting no part of her territory or rightful sovereignty and jurisdiction." Diplomatic intercourse was, however, suspended by the Mexican Government both at the City of Mexico and at Washington.

"Since that time Mexico has, until recently, occupied an attitude of hostility toward the United States—has been marshaling and organizing armies, issuing proclamations, and avowing the intention to make war on the United States, either by an open declaration, or by invading Texas. Both the congress and convention of the people of Texas invited this Government to send an army into that territory, to protect and defend them against the menaced attack. The moment the terms of annexation offered by the United States were accepted

by Texas, the latter became so far a part of our own country as to make it our duty to afford such protection and defense. I therefore deemed it proper, as a precautionary measure, to order a strong squadron to the coasts of Mexico, and to concentrate an efficient military force on the western frontier of Texas."

President Polk, first annual message, Dec. 2, 1845, S. Doc. 1, 29 Cong. 1 sess. 5.

July 13, 1869, the Secretary of the Navy wrote to Commander Owen that Gen. Babcock was proceeding to San Domingo with instructions from the President. Commander Owen was directed to "remain at Samana, or on the coast of San Domingo, while General Babcock is there, and give him the moral support of your guns."

November 6, 1869, Capt. Balch was instructed by the Secretary of the Navy to be ready to receive on board three officers ordered by the President to take passage to San Domingo. "Gen. Babcock," it was added, "will have certain orders from the President of the United States. You are directed to conform to all his wishes and orders, and to convey him to such points as he may desire to visit."<sup>a</sup>

In December, 1869, advices were received at Washington that General Saget, the Haytian leader who had just overthrown the Government of Salnave, which was friendly to the United States, had, during the pendency of the negotiations between the United States and San Domingo, assisted Gen. Cabral, who was then in arms against the Dominican Government, with war steamers and troops.

The Haytian Government had been notified that any military movement against San Domingo would be considered as a hostile act against the United States. The Secretary of the Navy therefore instructed Admiral Poor, January 29, 1870, to proceed to Port au Prince and inform the Haytian authorities that the United States was determined to protect the existing Dominican Government with all its power. He was then to proceed to San Domingo and use his force to give the most ample protection to that Government, against any power attempting to interfere with it. If the Haytians attacked the Dominicans with their ships, he was to destroy or capture them. Instructions of a similar purport were given to other naval officers.

Admiral Poor proceeded to Port au Prince and acquainted the government there with the nature of his instructions. He learned afterwards, unofficially, that the authorities were displeased at what they considered a menace on the part of the United States, accompanied with force.

On March 8, 1870, Admiral Poor reported his arrival at San Domingo City on the 5th of that month. Cabral, he said, seemed to

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<sup>a</sup>See *infra*, § 121, where the purport of General Babcock's formal instructions of July and November, 1869, is given.



have made no active movement since the United States declared its intentions with regard to San Domingo.

S. Ex. Doc. 34, 41 Cong. 3 sess. 6, 10, 11, 12, 14, 15, 16. Resolutions offered in the Senate by Mr. Sumner, condemnatory of the orders given to the Navy in this instance, as involving an unlawful assumption by the President of the war-making power, were laid on the table, March 29, 1871, by a vote of 39 to 16. (Cong. Globe, 42 Cong. 1 sess. (1871), part 1, pp. 232, 250, 294, 305, et seq.; also, Appendix, pp. 51 et seq.)

“Negotiations are pending between the United States and President Baez of the Dominican Republic, relative to the Bay of Samana.

“It has come to the knowledge of this Department that in case of the overthrow of the government of President Salnave in Hayti, those who may succeed him may possibly be disposed to interfere with the internal peace of the Dominican Republic. This Government will look with disfavor upon any such attempt, and you will not fail to make that clear to any government that may exist in Hayti. You will also, in case it comes to your knowledge that any attempts are to be made from Hayti or elsewhere to interfere with the domestic peace of Dominica pending these negotiations, without delay communicate your information to the nearest officer in command of a vessel of war of the United States and to this Department. And you will at all times and in every way in your power, discourage any such attempts.”

Mr. Fish, Sec. of State, to Mr. Bassett, min. to Hayti, Dec. 22, 1869, MS. Inst. Hayti, I. 172.

“Representations have been made to this Government by that of the Dominican Republic, that the Government of Hayti is constantly putting in jeopardy the tranquillity of that Republic by conniving at the organization of factions in Hayti and by furnishing war materials to Dominican insurgents. It is also represented that this is done despite professions of strict neutrality on the part of the Haytian Government.

“It is presumed that that Government must be aware that, at this juncture especially, the Government of the United States is peculiarly interested in the exemption of the Dominican Republic both from internal commotions and from invasions from abroad. If, therefore, there should be any just foundation for the complaint of the Dominican Government adverted to, this Government expects that at least so long as the relations of the United States with that Republic shall continue to be as intimate and as delicate as they now are the Haytian Government will as a proof of its good will towards us do everything which may be in its power towards avoiding any cause for such complaint.

“You will address a note to this effect to the Haytian Minister for Foreign Affairs.”

Mr. Fish, Sec. of State, to Mr. Bassett, min. to Hayti, Nov. 16, 1870, MS. Inst. Hayti, I. 197.

(3) QUESTION AS TO ANNEXATION BY A NEUTRAL PENDING WAR.

§ 85.

“As the question may arise, how far in a state of war one of the parties can of right convey territory to a neutral power, and thereby deprive its enemy of the chance of conquest incident to war, especially when the conquest may have been actually projected, it is thought proper to observe to you, 1st, That in the present case the project of peaceable acquisition by the United States originated prior to the war, and consequently before a project of conquest could have existed. 2d, That the right of a neutral to procure for itself by a *bona fide* transaction property of any sort from a belligerent power ought not to be frustrated by the chance that a rightful conquest thereof might thereby be precluded. A contrary doctrine would sacrifice the just interests of peace to the unreasonable pretensions of war, and the positive rights of one nation to the possible rights of another. A restraint on the alienation of territory from a nation at war to a nation at peace is imposed only in cases where the proceeding might have a collusive reference to the existence of the war, and might be calculated to save the property from danger, by placing it in secret trust, to be reconveyed on the return of peace. No objection of this sort can be made to the acquisitions we have in view. The measures taken on this subject were taken before the existence or the appearance of war; and they will be pursued as they were planned, with the *bona fide* purpose of vesting the acquisition forever in the United States.”

Mr. Madison, Sec. of State, to Messrs. Livingston and Monroe, plenipotentiaries to France, May 28, 1803, Am. State Papers, For. Rel. II. 562.

The discussion contained in the foregoing passage, which was written in the expectation that a final rupture of the Peace of Amiens would take place pending negotiations with France for the cession of New Orleans, proved to be speculative, since the treaty ceding Louisiana to the United States was concluded more than two weeks before the war between France and Great Britain was renewed. The treaty of cession and the convention for the payment of 60,000,000 francs to France, were signed in French May 2, 1803, and in English two or three days later; the convention relating to the payment of American claims was signed on the 8th or 9th of May, but all were antedated as of April 30. (Adams's History of the United States, II. 42.)

See, as to Mexico's attitude with reference to Texas, *supra*, § 84; *infra*, § 103.

## (4) PROPERTY THAT PASSES BY CESSION.

## § 86.

By Art. II. of the treaty of April 30, 1803, by which France ceded Louisiana to the United States, it was declared that the cession "included the designated islands belonging to Louisiana, all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private property," as well as "the archives, papers and documents, relative to the dominion and sovereignty of Louisiana and its dependencies." The province was surrendered to the United States on December 30, 1803, and a record was made of the transaction by the commissioners who were concerned in it. The commissioners on the part of the United States were William C. C. Claiborne and James Wilkinson; the commissioner on the part of France was Peter Clément Laussart, colonial prefect. The *procès verbal* recited that the commissioners met at the city hall, and that, the full powers of the commissioners having been delivered, the French commissioner delivered to the commissioners of the United States "the keys of the city of New Orleans," at the same time declaring that he discharged "from their oaths of fidelity to the French Republic the citizens and inhabitants of Louisiana who should choose to remain under the dominion of the United States."

Am. State Papers, For. Rel. II. 581-582.

Messrs. Claiborne and Wilkinson communicated the documents to Mr. Madison, Secretary of State, with a letter of Dec. 20, 1803.

In a letter of Dec. 27, 1803, Messrs. Claiborne and Wilkinson enclosed to the Secretary of State an "original copy" of the *procès verbal* of the delivery. They said that the "barracks, magazines, hospital, and publick storehouses" in the city of New Orleans were still in the occupancy of the Spanish authorities; they considered these buildings "as appendages of the military posts and essential to their defense." "The public records, archives, &c., recognized in the treaty are not yet delivered. The prefect has given us assurances that these documents are now arranging and will soon be in a state for delivery. The fort at Piakemine's and the blockhouse at the Balize have been taken possession of by a detachment of our troops, and measures will immediately be taken by Genl. Wilkinson to occupy the post at Natchitoches on the Red River." In another letter of March 11, 1804, they stated that the French commissioner had declared that "France had expected us to take her cannon and military stores, that being disappointed in that expectation, and the war which is now raging preventing their being transported to the territories of France, he should reserve a portion of the public storehouses and magazines for the preservation of the property of France." They proposed "to receive the cannon and military stores of France in this city by way of deposit and to keep them in safety, ready to be restored when it might be more convenient to remove them from the province. . . . He still persists in his determination to reserve a portion of the storehouses and magazines for the use of France." (MSS. Dept. of State.)

Louisiana was ceded to the United States in full sovereignty and in every respect, with all its rights and appurtenances, as it was held by the Republic of France and as it was received by that Republic from Spain.

*New Orleans v. United States*, 10 Pet. 662; *Strother v. Lucas*, 12 Pet. 410.

The cession included reservations of the right to use of the soil for public purposes. (*Josephs v. United States*, 1 Nott and H. 197; 2 id. 586.)

By Art. II. of the treaty of February 22, 1819, Spain ceded to the United States "in full property and sovereignty" the territories known as East and West Florida. The **The Floridas.** cession was declared to include "the designated islands dependent on said provinces, all public lots and squares, vacant land, public edifices, fortifications, barracks, and other buildings, which are not private property, archives and documents, which relate directly to the property and sovereignty of said provinces."

By Art. VII. of the same treaty Spain agreed to evacuate the territories in question within six months after the exchange of the ratifications, and to give possession to the commissioners or officers of the United States duly appointed to receive them; and it was provided that the United States should "furnish the transports and escort necessary to convey the Spanish officers and troops and their baggage from Havana."

The royal order for the delivery of the territories to the United States was signed by the King of Spain October 24, 1820. This order recited the stipulations of the treaty which have just been quoted. It was addressed to the captain-general and governor of the island of Cuba and of the Floridas."

March 20, 1821, President Monroe appointed General Jackson to administer the affairs of the Floridas, on their delivery to the United States. On the 23d of the same month Mr. John Quincy Adams, his Secretary of State, addressed a letter to General Jackson, in which he adverted to the circumstance that the second article of the treaty, while it stipulated that the fortifications should be ceded to the United States, made no express mention of the cannon belonging to them. By the seventh article of the treaty, said Mr. Adams, "the United States was to furnish the transports and escort necessary to convey the Spanish officers and troops and their baggage to Havana; but no mention was made of the transportation of cannon, nor was there any express arrangement on the part of the United States to furnish provisions to the Spanish officers and troops on passage. It was," he declared, "the opinion of the President that by a fair and just construction of the treaty the cannon belonging to the fortifications were to be considered as appendages to them, included in the cession."

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"Am. State Papers, For. Rel. IV. 702.

On the same principle he thought that provisions for the Spanish officers and troops should be furnished by the United States, and orders had accordingly been given for them. If the Spanish commissioners should claim the cannon in the fortifications because they were not expressly named in the article, General Jackson was to insist that the United States was not bound to furnish the provisions and would claim reimbursement for them.

The question anticipated by Mr. Adams actually arose in the delivery of East Florida. The formal act of cession was performed at St. Augustine, July 10, 1821, by Colonel Robert Butler on the part of the United States, and Colonel José Coppinger on the part of Spain. The documents relating to the transaction were transmitted by Col. Butler to Mr. Adams, July 30, 1821.<sup>a</sup>

During the discussions at St. Augustine, the Spanish commissioner took the ground that the "artillery, ammunition, and ordnance stores" did not go with the fortifications as part of the cession. The word fortifications, he maintained, comprehended, as his instructions advised him, "solely the material and immovable parts," but not the arms, ammunition, and ordnance stores, which were to be placed in the same category as the cots, furniture, and utensils used by the troops and to be taken away. He added that it was "well known that on the delivery of this province by Great Britain to Spain, the former withdrew all the above-mentioned effects as being the practice in similar cases unless otherwise stipulated."<sup>b</sup>

The American commissioner replied that his Government laid no claim to "the ammunition and ordnance stores," but considered the artillery in the fortifications "was appendant to and should remain with them." For this view he also found support both in the order of the captain-general of Cuba, which did not require the removal of the artillery, and also in the 7th article of the treaty, which obliged the United States to "furnish the transports and escort necessary to convey the Spanish officers and troops and their baggage to the Havana." Should the artillery be left behind, he would engage to furnish a reasonable proportion of the transportation for the ammunition and ordnance stores; but in case it should be removed, he was obliged to protest against the measure, and to declare not only that the United States was not bound to furnish either transportation or escort for the artillery, ammunition, and ordnance stores, but also that his Government would have a claim against Spain as well for the artillery as for the articles which it had provided for the subsistence of the Spanish troops on the way to the Havana, should those articles be made use of.<sup>c</sup>

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<sup>a</sup> Am. State Papers, For. Rel. IV. 749.

<sup>b</sup> Gov. Coppinger to Adj. Gen. Butler, June 14, 1821, MSS. Dept. of State.

<sup>c</sup> Adj. Gen. Butler to Gov. Coppinger, June 15, 1821, MSS. Dept. of State.

The act of cession which was signed by the commissioners states that they had had several conferences and had received documents, inventories, and plans appertaining to the property and sovereignty of Spain. The act recited that the commissioners had transmitted to their Governments "the doubts occurring as to whether the artillery ought to be comprehended in the fortifications; and if the public archives relating to private property ought to remain and be delivered to the American Government by virtue of the cession; and that there remained in the fortifications, until the aforesaid resolution is made, the artillery, munitions, and implements specified in a particular inventory, awaiting on these points, and the others appearing in question in our correspondence, the superior decision of our respective Governments." <sup>a</sup>

In the subsequent discussion of the subject between the two Governments, the Spanish Government declared that it would adhere to the strict construction of the article, and offered to pay for the provisions in consideration of the cannon being restored or paid for by the United States, the cannon being, as the Minister of Foreign Affairs observed, of greater value than the provisions. Mr. Adams replied that he had not taken into account the question of value, but had proceeded solely on principle. Under the term fortifications the United States claimed, he affirmed, the artillery, together with the walls of which they formed the defense. "The walls without their artillery were no fortifications." The United States, however, did not, said Mr. Adams, wish to press the controversy further, but would, on being repaid the cost of the provisions, permit the ordnance to be taken away. <sup>b</sup>

By Art. II. of the treaty of March 30, 1867, ceding Alaska to the United States, the cession was declared "to include **Alaska.** the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property," as well as any Government archives, papers, and documents relating to the territory in question. By Art. IV. the two Governments agreed to appoint agents for the purpose of transferring "the territory, dominion, property, dependencies, and appurtenances" which were ceded above. The Government of the United States appointed as commissioner General Lovell H. Rousseau, and the Russian Government Captain Alexis Pestchouroff. The formal delivery was made at Sitka, October 26, 1867. The *procès verbal* stated that Captain Pestchouroff delivered to General Rousseau "the Government archives, papers, and documents relating to the property and dominion above named, also the forts and public buildings, including the governor's house, dock-

<sup>a</sup> Am. State Papers, For. Rel. IV. 750.

<sup>b</sup> Mr. Adams, Sec. of State, to Mr. Nelson, min. to Spain, April 28, 1823, MS. Inst. U. S. Ministers, IX. 183, 227).

yards, blockhouses, barracks, hospitals, wharves, and schools." Accompanying the *procès verbal* are four inventories marked A, B, C, and D. Inventory A consists of a list of the public property in Sitka delivered to the United States. This included five forts, with their armaments, and also a number of buildings of various kinds. No mention whatever is made of furniture, and it seems obvious that it went with the buildings. Inventory B contained the property belonging to the Greek Church. Inventory C contained a list of the persons holding property in fee simple in the city of Sitka. Inventory D contained a statement of private property in Sitka. It specified a large number of buildings of various kinds, but mentioned no furniture, showing that the latter was considered for the purposes of the inventory as being included in the building. There was also a fifth inventory, marked E, containing a list of forts, with armaments, and other public buildings on the island of Kodiak to be delivered to the United States.<sup>a</sup>

A building erected in 1845 by the Russian-American Company, on land belonging to the Russian Government, became the property of that Government, and as such was transferred to the United States by the treaty of March 30, 1867, especially in view of the declaration of article 6, that the "cession of territory and dominion" was "free and unincumbered by any reservations, privileges, franchises, grants, or possessions by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property holders."

Kinkead v. United States, 150 U. S. 483 (1893). It appeared by the record of the negotiations that the United States increased the amount to be paid to Russia for Alaska by the sum of \$200,000 in consideration of the insertion of article 6 of the treaty.

By the protocol signed at Washington August 12, 1898, Spain **Spanish islands, 1898.** agreed to "relinquish all claim of sovereignty over or title to Cuba," and to "cede to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies." It was also stipulated that Spain should "immediately evacuate Cuba, Porto Rico, and the other islands under Spanish sovereignty in the West Indies," and that, within thirty days after the signing of the protocol, commissioners should meet at Havana, in Cuba, and at San Juan, in Porto Rico, for the purpose of "arranging and carrying out the details of the evacuation." Commissioners to treat of peace were to meet at Paris not later than October 1, 1898.

Prior to the negotiation of the treaty of peace commissioners on the part of the United States and of Spain met, in conformity with the

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<sup>a</sup>Diplomatic Correspondence, 1868, I. 475-484.

stipulations of the protocol, at Havana and at San Juan. The American commissioners were instructed, as the relinquishment or cession of sovereignty by Spain would include all the "immovable property" belonging to the Spanish Government in the islands, to "take into possession for the United States all public buildings and grounds, forts, fortifications, arsenals, depots, docks, wharves, piers, and other fixed property heretofore belonging to Spain;" and they were further instructed as follows: "The small arms and accoutrements, batteries of field artillery, supply and baggage wagons, ambulances, and other impedimenta of the Spanish army in Cuba and the adjacent Spanish islands you will permit to be removed, if desired, by the representatives of Spain, provided such removal shall be effected within a reasonable time. The armament of forts, fortifications, and fixed batteries, being in the nature of immovable fixtures, will not be permitted to be taken, but will, in connection with said forts, fortifications, and batteries, be taken over by you into the possession of the United States."<sup>a</sup>

The Spanish commissioners, on the other hand, stated that the Spanish troops would "carry with them their flags, arms, munitions, equipment, clothing, saddles, stores, artillery pieces of all kinds with the mountings, sets of arms and other accessories, as also all material of war and sanitation, the machines and stock on hand of the establishments of military industry, besides the records and documents of the military dependencies and army corps."<sup>b</sup>

The American commissioners replied "that under the law movable things became immovable property when constructed or destined for the permanent use or service of immovable property. This is not only in accord with the civil law of Spain, but also with the common law. Under this rule we have claimed, and do now claim, that all the ordnance in fortifications or fixed batteries, of whatever character, kind, or condition—no matter from whence brought, or what its origin may have been—all machinery attached to buildings used as arsenals or military or naval construction repair shops or navy-yards, and the shears on the docks in Havana, are immovable property, and that Spain has no right to dismount or remove, or in any manner dispose of the same, or any part thereof."

The Spanish commissioners declined to accept this opinion, saying that they preferred to refer the matter to their Government for settlement, and remarking that "they desired to state that they hold the same views as to the real estate and public buildings, the property of Spain in the island of Cuba."<sup>c</sup>

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<sup>a</sup>For. Rel. 1898, 910, 913.

<sup>b</sup>Letter of the Spanish commissioners to the American commissioners, Havana, Sept. 18, 1898, MS. Proceedings of the Cuban Evacuation Commission. The same position was taken by the Spanish commissioners at San Juan.

<sup>c</sup>MS. Proceedings of the Cuban Evacuation Commission: Minutes of the Joint Meeting of Nov. 16, 1898.



A formal agreement as to the evacuation was concluded November 16, 1898, by which it was provided that the Spanish troops should "carry with them their flags, small arms with the ammunition thereto belonging, accoutrements, clothing, batteries of field artillery, siege guns not mounted in fixed batteries, and ammunition thereto belonging, horses, saddles, supply and baggage wagons and their animals, ambulances, medical stores, subsistence stores, camp equipments, and records and archives of the various organizations of the Spanish forces, and of their respective bureaus." It was decided by the commission that the floating steel dry dock at Havana was to be considered as movable property belonging to Spain; and it was subsequently purchased by the United States.

With regard to other property, the agreement recited that an "irreconcilable difference" existed between the commissioners "as to the disposition of the public property of Spain in the island of Cuba, and the adjacent Spanish islands, consisting (1) of artillery in fixed batteries and fortifications, the fixtures and other property thereto belonging, as heretofore inventoried;" (2) "of the machinery and fixtures and other property and material of war heretofore in dispute in the 'Masestranza,' in the 'Pirrotecnia Militar,' and in the 'Arsenal' in Havana, and of other military and naval property of a fixed character in barracks, hospitals, quarters, and other buildings, and (3) of the real estate and public buildings on said islands belonging to or under the control of Spain;" and it stipulated that "in respect to said property, the status quo ante shall be preserved until existing differences concerning the disposition of said property shall have been finally settled by the proper authorities."

With regard to the third class of property—the real estate and buildings belonging to Spain in the territories relinquished or ceded by her—it appears that the question was incidentally disposed of in the peace negotiations at Paris.

The American Peace Commission at Paris proposed, Oct. 3, 1898, the following articles:

"The Government of Spain hereby relinquishes all claim of sovereignty over and title to Cuba.

"The Government of Spain hereby cedes to the United States the Island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and also the Island of Guam, in the Ladronez."

Accompanying these articles there was a stipulation that the relinquishment or cession, as the case might be, included "all right and claim to the public domain, lots and squares, vacant lands, public buildings, fortifications and the armaments thereof, and barracks and other structures which are not private individual property," as well as the public archives.

By a counter proposal of Oct. 7, 1898, the Spanish Commission, while undertaking to relinquish or cede "all the buildings, wharves,

barracks, fortresses, establishments, public ways of communication, all other immovable property which according to law attaches to the public domain, and which so attaching belongs to the Crown of Spain," put forward a stipulation that all immovable property "which under the civil law belongs to the State as patrimonial property, and all rights and property of whatsoever kind, which up to the ratification of the present treaty have been peacefully enjoyed and held in ownership by provinces, municipalities, public and private establishments, ecclesiastical and civil corporations, or any other collective bodies lawfully incorporated and having legal authority to acquire and hold property in the Island of Cuba, and by private individuals, whatsoever their nationality, are therefore excluded from the above relinquishment and transfer."

The American Commission objected to this negative clause, on the ground that in one respect it was unnecessary, and in another illogical. "So far," said the American Commission, "as it affects the question of legal title it is unnecessary, since such title, if not held by Spain, would not pass to the United States by Spain's transfer of sovereignty. On the other hand, so far as it affects the question of sovereignty, it is illogical, since the sovereignty, which includes the right of eminent domain, would, if excepted from the relinquishment, remain with Spain. We should thus have the singular spectacle of Spain relinquishing her sovereignty over property belonging to the Crown, but retaining it over all other property."

The Spanish Commission subsequently waived the clause in regard to "patrimonial property," saying: "The State, under the Spanish laws, exercises all rights of ownership over the property declared by law to be public property, and it is plain that in this case the cession of the sovereignty carries with it the cession of all those rights. But the State in Spain can also, in the capacity of a body politic or corporation, acquire and hold real property, by the same means and through the same processes, as private persons can do under civil municipal law. This peculiar kind of property was the one referred to in the exception suggested by the Spanish Commissioners. Notwithstanding this fact, . . . the Spanish Commissioners do hereby waive the said exception, and agree that the patrimonial property of the State be also included in the cession and transfer of the sovereignty of Spain."<sup>a</sup>

An agreement was also reached at Paris concerning the heavy guns and armaments in the Philippines, but not concerning those in Cuba and Porto Rico. It appears by the record of the negotiations that on Dec. 2, 1898, the president of the Spanish Commission brought up for discussion the question of "the return to Spain of the war material in Cuba and Porto Rico, with respect to which the evacuation com-

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<sup>a</sup>S. Doc. 62, 55 Cong. 3 sess., part 2, pp. 22, 28, 34, 90.

missions had not come to a decision, since such material in the Philippines, he understood, belonged to Spain."<sup>a</sup> The question was not then discussed, but, when it was raised again, on the 5th of December, the American Commissioners "declared that they were not authorized to treat" concerning the return of the war material in Cuba and Porto Rico not disposed of by the evacuation commissions; and they added, with respect to the war material in the Philippines, "that it should be governed by the same conditions as were agreed to by the evacuation commissions in the West Indies." But, says the protocol, "the president of the Spanish Commission and his colleagues maintained that the cession of the archipelago did not carry and could not carry with it anything except what was of a fixed nature; they explained the character of the siege artillery and heavy ordnance which the Americans claimed for themselves, and after some discussion to the end of determining precisely what each commission understood as portable and fixed material, it was agreed that stands of colors, uncaptured war vessels, small arms, guns of all calibers, with their carriages and accessories, powder, ammunition, live stock and materials and supplies of all kinds belonging to the land and naval forces shall remain the property of Spain; that pieces of heavy ordnance, exclusive of field artillery, in the fortifications, shall remain in their emplacements for the term of six months, to be reckoned from the ratification of the treaty; and that the United States might in the meantime purchase such material from Spain if a satisfactory agreement between the two governments on the subject should be reached."<sup>b</sup>

This agreement was embodied, in almost identical terms, in Art. V. of the treaty of peace. And it was held by the United States that, under this article, the Spanish guns and other war material captured by the Navy at Cavite during active war must be deemed to be the property of Spain.<sup>c</sup>

<sup>a</sup> S. Doc. 62, 55 Cong. 3 sess., part 2, p. 226.

<sup>b</sup> S. Doc. 62, 55 Cong. 3 sess., part 2, pp. 228-229. See, also, Magoon's Reports, 566.

<sup>c</sup> "While it might be admitted that there would be some question of the ownership of this material in the absence of any provision with reference thereto in the treaty, there would not appear to be any doubt as to the right or power of the Commission to treat of the subject in the negotiations. . . . The Peace Commissioners did treat of the matter, reached an express agreement in regard to it, and embodied it in the treaty, without limitation or definition as to whether the property in question might have passed under the control of the United States forces either prior to or subsequent to the suspension of hostilities which followed the signing of the Peace Protocol in Washington on the 12th of August, 1898. This being so, it is not perceived how it could be claimed that the property in question was not affected by the treaty because of its having been captured during active war, unless upon the extreme contention that such material having been captured by the United States naval forces before the date of the treaty is to be considered as not coming under the description of property 'belonging to the land and naval forces of Spain.' As to this I may observe that had

"A distinction is sought to be made between those waters of rivers which belong, by the law of Spain, to the State or Crown and those which belong to the public of Porto Rico. For practical purposes, in the disposition of this case, I can see no difference. Whatever property or property rights belonged to the Crown of Spain or to the indefinite body known as 'the public of Porto Rico' were, by the treaty of Paris, transferred to and became the property of the United States of America."

Griggs, At.-Gen., July 27, 1899, 22 Op. 546, 547. Under the Spanish law, lands under tide water to high-water mark in the ports and harbors in the Spanish West Indies belonged to the Crown, and, as the property of the Crown, they became, by the treaty of cession, a part of the public domain of the United States. (Griggs, At.-Gen., July 26, 1899, 22 Op. 544.)

#### 4. CONQUEST.

#### § 87.

The holding of a conquered territory is regarded as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such a transfer of territory it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the Government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the state.

American Insurance Co. v. Canter, 1 Peters, 511.

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any such important qualification or limitation been intended by the framers of the Peace Treaty it is hardly conceivable that it should not have found expression in the language of that compact. My view finds confirmation in the use in the treaty provision in question of the words 'uncaptured war vessels,' the object of which was to except from the property to be turned over to Spain the vessels which had been captured by Admiral Dewey. No such distinction is made as to any of the other property or materials named." (Mr. Hill, Acting Sec. of State, to the Sec. of War, Sept. 23, 1899, 240 MS. Dom. Let. 253. See also, Mr. Hay, Sec. of State, to the Sec. of the Navy, Apr. 21, 1900, 244 MS. Dom. Let. 434, saying: "In Cuba and Porto Rico the Spaniards had the right (and used it) to carry away any of the described property they could find," which it was agreed they might take away, "whether it had been captured by the United States or not. The only test was that the property should be found in existence at the time of the evacuation and that the fact that it had belonged to the Spanish Government should be shown. The evacuator simply took it in the condition in which they found it.")

By the conquest and military occupation of Castine by the British on September 1, 1814, that territory passed under the temporary allegiance and sovereignty of the enemy. The sovereignty of the United States over the territory was suspended during such occupation, so that the laws of the United States could not be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. But, on the other hand, a territory conquered by an enemy is not to be considered as incorporated into the dominions of that enemy, without a renunciation in a treaty of peace, or a long and permanent possession. Until such incorporation, it is still entitled to the full benefit of the law of postliminy.

U. S. v. Hayward, 2 Gall. 485. See U. S. v. Rice, 4 Wheat. 246.

The capture and occupation of Tampico, by the arms of the United States, during the war with Mexico, though sufficient to cause it to be regarded by other nations as part of our territory, did not make it a part of the United States under our constitution and laws; it remained a foreign country within the meaning of the revenue laws of the United States.

Fleming v. Page, 9 Howard, 603.

“The authority and jurisdiction of Mexican officials [in California] terminated on the 7th of July, 1846. On that day the forces of the United States took possession of Monterey, the capital of California, and soon afterwards occupied the principal portions of the country, and the military occupation continued until after the treaty of peace. The political department of the government designated that day as the period when the conquest of California was complete and the authority of the officials of Mexico ceased.”

More v. Steinbach (1888), 127 U. S. 70, 80, citing *Fremont v. United States*, 17 How. 542, 563.

Down to the middle of the eighteenth century the practice of belligerent nations accorded with the theory that all kinds of property, coming into the hands of one of the parties to the war, vested in him as conqueror and were subject to his absolute disposal, so that he might even alienate or cede the occupied territory while the issue of hostilities remained undecided. But since that period this rule has been either abandoned or subjected to very material limitations both in theory and in practice. With reference to what is said in the foregoing case, it is to be remembered that permanent title to California passed to the United States under the treaty of Guadalupe Hidalgo.

See the cases of the “Georgiana” and “Lizzie Thompson,” Moore, Int. Arbitrations, II. 1606-1608.

See, as to the validity of the payment to the temporary occupant of debts due to the titular sovereign, the case of the occupation of Naples by Charles VIII. in 1495, Phillimore, Int. Law, III. 838; and, as to the validity of the payment of such debts to the conqueror who gains and maintains a firm possession, the case of Hesse Cassel, id. 841.

At the International American Conference, in Washington, the delegates of the Argentine Republic and Brazil offered, January 15, 1890, a series of resolutions, the eighth article of which read as follows: "Acts of conquest, whether the object or the consequence of the war, shall be considered to be in violation of the public law of America." (Minutes of the International American Conference, 107, 108.)

The resolutions were referred to the committee on general welfare, which, April 18, 1890, recommended the adoption of the following declarations:

- "1. That the principle of conquest shall never hereafter be recognized as admissible under American public law.
- "2. That all cessions of territory made subsequent to the present declarations shall be absolutely void if made under threats of war or the presence of an armed force.
- "3. Any nation from which such cessions shall have been exacted may always demand that the question of the validity of the cessions so made shall be submitted to arbitration.
- "4. Any renunciation of the right to have recourse to arbitration shall be null and void whatever the time, circumstances, and conditions under which such renunciation shall have been made."

These declarations were subscribed by three members of the committee respectively representing the Argentine Republic, Bolivia, and Venezuela. Three other members representing Colombia, Brazil, and Guatemala stated that they adopted only the first of the declarations.

Mr. Varas, a delegate from Chile, stated that the delegation from that country would abstain from voting or taking part in the debate on the resolutions.

Mr. Henderson, a delegate from the United States, offered, as expressing the views of the United States delegation, the following resolution:

"*Whereas*, in the opinion of this conference, wars waged in the spirit of aggression or for the purpose of conquest should receive the condemnation of the civilized world: Therefore

"*Resolved*, That if any one of the nations signing the treaty of arbitration proposed by the conference, shall wrongfully and in disregard of the provisions of said treaty, prosecute war against another party thereto, such nations shall have no right to seize or hold property by way of conquest from its adversary."

After a long discussion, in which the delegate from Peru supported the recommendation of the committee as a whole, the report was adopted by a majority of 15 to 1. The delegations voting affirmatively were Hayti, Nicaragua, Peru, Guatemala, Colombia, Argentine Republic, Costa Rica, Paraguay, Brazil, Honduras, Mexico, Bolivia, Venezuela, Salvador, and Ecuador. The United States voted in the negative, while Chile abstained from voting.

Further discussion then took place, after which a recess was taken in order that an agreement might be arrived at which would secure the vote of the United States delegation. On the session being resumed, Mr. Blaine presented the following plan:

- "1. That the principle of conquest shall not, during the continuance of the treaty of arbitration, be recognized as admissible under American public law.
- "2. That all cessions of territory made during the continuance of the treaty of arbitration shall be void if made under threats of war or the presence of an armed force.
- "3. Any nation from which such cessions shall be exacted may demand that the validity of the cessions so made shall be submitted to arbitration.
- "4. Any renunciation of the right to arbitration made under the conditions named in the second section shall be null and void."

The conference unanimously agreed to accept this as a substitute for the former report, Chile abstaining from voting. (Minutes of the International American Conference (1889-90), 798-806. The plan of a treaty of arbitration adopted by the conference never became operative.)

## 5. PRESCRIPTION.

## § 88.

Grotius, referring to the theory of Vasquius, that the doctrine of prescription was inapplicable as between nations, says:

**Opinions of publicists.** "Yet, if we admit this, there seems to follow this most unfortunate conclusion, that controversies concerning kingdoms and the boundaries of kingdoms, are never extinguished by any lapse of time; which not only tends to disturb the minds of many and perpetuate wars, but is also repugnant to the common sense of mankind."

Grotius, *De Jure Belli ac Pacis*, Lib. II. Cap. IV. § 1.

The original text reads: "Atque id si admittimus, sequi videtur maximum incommodum, ut controversiæ de regnis regnorumque finibus nullo unquam tempore extinguantur: quod non tantum ad perturbandos multorum animos et bella serenda pertinet, sed et communi gentium sensui repugnat."

Prescription was a title known to the Roman Law. (Institutes of Justinian, Lib. II. Tit. VI.)

"And perhaps we may say that this is not merely a matter of presumption, but that this law is established by the voluntary law of nations, that a possession beyond memory, not interrupted, nor disturbed by appealing to an arbitrator, absolutely transfers dominion. It is credible that nations have agreed on this, since such a rule is most conducive to the public peace."

Grotius, *De Jure Belli ac Pacis*, Lib. II. Cap. IV. § 9.

The original text reads: "Ac forte non improbabiler dici potest non esse hanc rem in sola presumptione positam, sed jure gentium voluntario inductam hanc legem, ut possessio memoriam excedens, non interrupta, nec provocatione et arbitrum interpellata, omnino dominium transferret. Credibile est enim in id consensisse gentes, cum ad pacem communem id vel maxime interesset."

That the doctrine of international prescription is sometimes discussed by analogy to the rule of the common law in matters of private litigation, as if it depended upon presumption as to a prior grant, may be seen in the following passage: "Now, mere lapse of time, independent of legislation or positive agreement, cannot of itself either give or destroy title. It gives title only so far as it creates a presumption, equivalent to proof, that a title exists, derived from higher sources: it *destroys* title only because it creates a like presumption that, whatever the title may have been, it has been transferred or abandoned. Thus it is merely evidence and nothing more. It creates a *presumption* equivalent to full proof. But it differs from proof in this, that proof is *conclusive* and final, whereas presumption is *conclusive* only until it is met by counter-proof, or a stronger counter-presumption." (Mr. Upshur, Sec. of State, to Mr. Everett, min. to England, Oct. 9, 1843, MS. Inst. Great Britain, XV. 148.)

"The tranquillity of the people, the safety of states, the happiness of the human race, do not allow that the possessions, empire, and other rights of nations should remain uncertain, subject to dispute and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title."

Vattel, *Law of Nations*, Lib. II. Cap. XI, § 149.

"The solid rock of prescription,—the soundest, the most general, and the most recognized title between man and man that is known in municipal or in public jurisprudence,—a title in which not arbitrary institutions, but the eternal order of things, gives judgment; a title which is not the creature, but the master, of positive law; a title which, though not fixed in terms, is rooted in its principle in the law of nature itself, and is indeed the original ground of all known property: for all property in soil will always be traced back to that source, and will rest there."

Edmund Burke, *Works* (Little, Brown & Co., 1867), VI. 412.

"Lapse of time, in the case equally of nations as of individuals, robs the parties of the means of proof, so that if a bona fide possession were allowed to be questioned by those who have acquiesced for a long time in its enjoyment by the possessors, length of possession, instead of strengthening, would weaken territorial title. . . . Thus, in regard to the territories of the Hudson's Bay Company, it was alleged in the negotiations preliminary to the treaty of Utrecht, that the French had acquiesced in the settlement of the Bay of Hudson by the company incorporated by Charles II. in 1663; since M. Fontenac, the Governor of Canada, in his correspondence with Mr. Baily, who was Governor of the Factories in 1637, never complained, 'for several years, of any pretended injury done to the French by the said company's settling a trade and building of forts at the bottom of the bay.'"

Twiss, *The Oregon Territory*, 125, citing a "General Collection of Treaties" (London, 1710-'33), I. 446.

"There unquestionably is a lapse of time after which one state is entitled to exclude every other from property of which it is in actual possession. In other words, there is an International Prescription, whether it be called Immemorial Possession, or by any other name. The peace of the world, the highest and best interests of humanity, the fulfillment of the ends for which states exist, require that this doctrine be firmly incorporated in the Code of International Law."

Phillimore, *Int. Law*, I. 303, § CCLVIII.

"The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called



*Prescription*, is justly applicable, as between nation and nation; but the constant and approved practice of nations shows that, by whatever name it is called, the uninterrupted possession of territory, or other property, for a certain length of time, by one state, excludes the claim of every other; in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question."

Wheaton, *Elements*, Dana's ed. 239.

Dana, in a note to this passage, observes that Phillimore classes Klüber and Martens as denying to prescription a place in international law, and Grotius, Heineccius, Wolff, Mably, Vattel, Bynkershoek, Rutherforth, Wheaton, and Burke as maintaining it.

"Title by prescription arises out of a long-continued possession, where no original source of proprietary right can be shown to exist, or where, possession in the first instance being wrongful, the legitimate proprietor has neglected to assert his right, or has been unable to do so."

Hall, *Int. Law* (4th ed.), 123, sec. 36.

"No human transactions are unaffected by time. Its influence is seen on all things subject to change. . . . For **Judicial decisions.** the security of rights, whether of states or individuals, long possession under a claim of right is protected. And there is no controversy in which this principle may be involved with greater justice and propriety than in a case of disputed boundary."

*Rhode Island v. Massachusetts* (1846), 4 Howard, 591, 639.

See, also, *Handly's Lessee v. Anthony* (1820), 5 Wheat. 374.

"But above all the evidence of former transactions and of ancient witnesses, and of geological speculations, there are some uncontroverted facts in the case which lead our judgment irresistibly to the conclusion in favor of the claim of Kentucky. It was over seventy years after Indiana became a State before this suit was commenced, and during all this period she never asserted any claim by legal proceedings to the tract in question. . . . It was not shown . . . that an officer of hers executed any process, civil or criminal, within it, or that a citizen residing upon it was a voter at her polls, or a juror in her courts, or that a deed to any of its lands is to be found on her records, or that any taxes were collected from residents upon it for her revenues. . . . It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority."

*Indiana v. Kentucky* (1890), 136 U. S. 479, citing *Rhode Island v. Massachusetts*, and the passages from Vattel and Wheaton, *supra*.

The line between Indiana and Kentucky was run in conformity with the foregoing decision, which assigned Green River Island, the territory in dispute, to Kentucky. (*Indiana v. Kentucky* (1895), 159 U. S. 275; (1896), 163 U. S. 520; (1897), 167 U. S. 270.)

Counsel for Indiana urged, in opposition to the claim of prescription, the maxim *nullum tempus occurrit regi*; but this maxim of the common law, governing the relations of sovereign and subject, is manifestly inapplicable to the relations between independent states. Nor is it always maintained in favor of the sovereign as against his subject. "Though lapse of time does not of itself furnish a conclusive bar to the title of the sovereign, agreeably to the maxim, *nullum tempus occurrit regi*; yet if the adverse claim could have had a legal commencement, juries are advised or instructed to presume such commencement, after many years of uninterrupted possession or enjoyment." (*United States v. Chavez* (1899), 175 U. S. 509, 522. See *Peabody v. United States*, 175 U. S. 546; *Chavez v. United States*, 175 U. S. 552.)

See, also, the opinion of Little, comr., in *Williams v. Venezuela*, Moore, Int. Arbitrations, IV. 4181-4199.

The doctrine of prescription is impliedly recognized in the various treaty stipulations which have been made for the joint occupation of disputed territory, one of their objects in such case being to negative the inference of title from long continued possession by either party of a particular portion of such territory. See, as illustrations, the treaties between the United States and Great Britain of Oct. 20, 1818 (Art. III.), and Aug. 6, 1827 (Art. I.), in relation to Oregon.

As to the requisite duration of occupation there can be no "arbitrary time limit except through the consensus, agreement, or uniform usage of civilized states. It is equally obvious and much more important to note that, even

**The Venezuelan  
boundary.**

if it were feasible to establish such arbitrary period of prescription by international agreement, it would not be wise or expedient to do it. Each case should be left to depend upon its own facts. A state which in good faith colonizes as well as occupies, brings about large investments of capital, and founds populous settlements would justly be credited with a sufficient title in a much shorter space than a state whose possession was not marked by any such changes of status. Considerations of this nature induce the leading English authority on international law to declare that, on the one hand, it is 'in the highest degree irrational to deny that prescription is a legitimate means of international acquisition;' and that, on the other hand, it will 'be found both inexpedient and impracticable to attempt to define the exact period within which it can be said to have become established, or, in other words, to settle the precise limitation of time which gives validity to the title of national possessions.' Again:

"The proofs of prescriptive possession are simple and few. They are principally publicity, continued occupation, absence of interruption (usurpatio), aided, no doubt, generally, both morally and legally speaking, by the employment of labor and capital upon the possession

by the new possessor during the period of silence, or the passiveness (inertia), or the absence of any attempt to exercise proprietary rights by the former possessor. The period of time, as has been repeatedly said, can not be fixed by international law between nations as it may be by private law between individuals. It must depend upon variable and varying circumstances; but in all cases these proofs would be required.'

"The inherent justness of these observations, as well as Sir Robert Phillimore's great weight as authority, seems to show satisfactorily that the condition of international law fails to furnish any imperative reasons for excluding boundary controversies from the scope of general treaties of arbitration."

Mr. Olney, Sec. of State, to Sir Julian Pauncefote, British ambassador, June 22, 1896, *For. Rel.* 1896, 232, 236.

"In deciding the matters submitted, the arbitrators shall ascertain all facts which they deem necessary to a decision of the controversy, and shall be governed by the following rules, which are agreed upon by the high contracting parties as rules applicable to the case, and by such principles of international law not inconsistent therewith as the arbitrators shall determine to be applicable to the case.

"RULES.

"(a) Adverse holding or prescription during the period of fifty years shall make a good title. The arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription.

"(b) The arbitrators may recognize and give effect to rights and claims resting on any other ground whatever, valid according to international law, and on any principles of international law which the arbitrators may deem to be applicable to the case and which are not in contravention of the foregoing rule.

"(c) In determining the boundary line, if territory of one party be found by the tribunal to have been at the date of this treaty in the occupation of the subjects or citizens of the other party, such effect shall be given to such occupation as reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the tribunal, require."

Art. IV., Treaty between Great Britain and Venezuela, concluded at Washington, Feb. 2, 1897, for the settlement of the boundary between British Guiana and Venezuela. This article was taken from a draft which was negotiated between the Governments of the United States and Great Britain, and which was signed at Washington Nov. 12, 1896, by Mr. Olney, Secretary of State, and Sir Julian Pauncefote, British minister, as the basis of a treaty between Great Britain and Venezuela. (*For. Rel.* 1896, 254.)

## 6. ABANDONMENT.

## § 89.

"There was a dispute of long standing between France and England respecting Santa Lucia, one of the Antilles Islands. After the treaty of Aix-la-Chapelle (1748), the matter was referred to the decision of certain commissioners, and it was the subject of various State papers in 1751 and 1754. The French negotiators maintained that, though the English had established themselves in 1639, they had been driven out or massacred by the Caribbees in 1640, and they had, *animo et facto* and *sine spe redeundi*, abandoned the island; that Santa Lucia being *vacant*, the French had seized it again in 1650, when it became immediately, and without the necessity of any prescriptive aid, their property. The English negotiators contended that their *dereliction* had been the result of violence, that they had not *abandoned* the island *sine spe redeundi*, and that it was not competent to France to profit by this act of violence, and surreptitiously obtain the territory of another State; and that by such a proceeding no *dominium* could accrue to them. The principal discussion turned, not upon the nature of the conditions of Prescriptive Acquisition, but upon the nature of the conditions of Voluntary Dereliction, by which the rights of property were lost, and the possession returned to the class of vacant and unowned (*ἀδέσποτα*) territories."

Phillimore, Int. Law, 2d ed. I. 308. Twiss, in connection with the rule that "a title by a later settlement may be set up against a title by an earlier settlement, . . . if the earlier settlement can be shown to have been abandoned," cites Wolff, Institutes du Droit des Gens, § eciii, who says: "It is said that a thing is abandoned, if only the owner (*maître*) does not wish it longer to be his. . . . Whence it would seem that he who abandons a thing ceases to be the owner of it, and that by consequence the thing abandoned becomes a thing which belongs to no one; but so long as the owner has no intention to abandon his property, he remains the owner of it." (The Oregon Territory, 122.)

As to the case of territory at Delagoa Bay, see Hall, Int. Law, 4th ed. 122; Moore, Int. Arbitrations, V. 4984.

"The Argentine Government has revived the long dormant question of the Falkland Islands, by claiming from the United States indemnity for their loss, attributed to the action of the commander of the sloop-of-war Lexington in breaking up a piratical colony on those islands in 1831, and their subsequent occupation by Great Britain. In view of the ample justification for the act of the Lexington and the derelict condition of the islands before and after their alleged occupation by Argentine colonists, this Government considers the claim as wholly groundless."

President Cleveland, annual message, Dec. 8, 1885.

In 1831 three American schooners, the *Harriet*, *Superior*, and *Breakwater* were seized, and their crews imprisoned, while taking seals on the Falkland, or Malvinas, Islands. President Jackson, in his annual message of

Dec. 6, 1831, described the captors as "a band acting, as they pretend, under the authority of the Government of Buenos Ayres," and recommended the adoption of measures "for providing a force adequate to the complete protection of our fellow-citizens fishing and trading in those seas." The captures were made by Luis Vernet, acting, by virtue of a decree of June 10, 1829, as political and military governor of the islands, to which the Government of Buenos Ayres claimed title as successor to Spain. Prior to that time, and since the withdrawal of the British forces in 1774, the islands had been unoccupied. In December 1831 Captain Duncan, of the U. S. S. *Lexington*, proceeded from Buenos Ayres to the islands, released the vessels and their crews, and dispersed the Argentine colonists. The Government of Buenos Ayres protested, but the United States disputed its claim of title, as well as its right to interrupt the exercise of a fishery on unsettled coasts, such as those in question. In January 1833 Great Britain resumed possession of the islands. (Br. and For. State Papers, XX. 314-411, 1194-1199; XXII. 1366-1394.)

"Can there be any doubt that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? . . . As the Executive, in his message, and in his correspondence with the government of Buenos Ayres, has denied the jurisdiction which it has assumed to exercise over the Falkland Islands, the fact must be taken and acted on by this court as thus asserted and maintained." (Williams v. Suffolk Ins. Co. (1839), 13 Pet. 415, 420.)

See Calvo, Droit Int., 4th ed., I. 417 et seq.

As to the Caroline and Pelew Islands, see For. Rel. 1886, 776, 831.

The United States maintained that Navassa Island in 1857, when a citizen of the United States took possession of it under the Guano Islands act, was "derelict and abandoned."

Jones v. United States (1890), 137 U. S. 202, 220, citing a letter of the Assistant Secretary of State to Mr. Clark, Nov. 17, 1858, S. Ex. Doc. 37, 36 Cong. 1 sess.

In February 1895 the island of Trinidad, lying 651 geographical miles off the coast of Brazil, was occupied by a British force as a cable station. Brazil protested against the occupation. It was stated, on the part of Great Britain, that possession was first taken of the island by the British Government in 1700; that no evidence was then found of Portuguese possession, nor was any protest made by Portugal; that, when possession was "resumed" by Great Britain, no trace of foreign occupation was found; and that, if there had been any intervening possession, it was to be considered as having been abandoned.

Brazil, on the other hand, maintained that the island was discovered by the Portuguese in 1501; that the British consequently gained no title by their naval officer touching there in 1700; that when, in 1781, Great Britain, being at war with Spain, occupied the island for the purpose of harrassing Spanish trade, Portugal, at the instance of Spain, protested; that, on August 22, 1782, the British Admiralty

ordered it to be evacuated; that the Portuguese Government subsequently asserted its title against the intrusive acts of British subjects; that Brazilian national vessels visited the island officially in 1825, 1831, 1856, 1871, 1884, and 1894; that the Brazilian Government in 1884 granted to one of its citizens a concession to carry on mining there, and in 1894 took steps toward using the island for a penal colony; and finally, that the island was enumerated among the possessions of Brazil by encyclopædists and geographers.

"Occupation is a legitimate method of acquiring domination only with relation to things that have no owner, *res nullius*, and such are those which are not under the dominion of anyone else, either from never having belonged to anyone or from having been abandoned by their former owner.

"In conformity with the rule of *nemo suum jactare præsumitur*, abandonment is something which is not to be presumed. It depends on the intention of relinquishing, or on the cessation of physical power over the thing, and must not be confounded with simple neglect or desertion. A proprietor may leave a thing deserted or neglected and still retain his ownership. The fact of legal possession does not consist in actually holding a thing, but in having it at one's free disposal. The absence of the proprietor, neglect, or desertion does not exclude free disposal, and hence *animo retinetur possessio*.

"Gaius (Inst. G. 4, sec. 154) teaches \* \* \* '*quoniam possidemus animo solo quum volumus retinere possessionem.*'<sup>a</sup>

"*Neque vero deseri locum aliquem satis est, ut pro derelicto habendus sit, sed manifestis appareat indiciis derelinquendi affectio,*' adds Mühlenbruch. (*Doctrina pandectarum*, 4th ed. sec. 237.)

"Abandonment can only result from the expressed manifestation of the will, for the *animus* is the possibility of repeating the first will to acquire possession, and, as Savigny teaches (sec. 32), there is no necessity of having constantly the consciousness of possession. Abandonment requires a new act of the will in a contrary direction to that of the first will, *animus, in contrarium actus*. '*Pro derelicto autem hebetur, quod dominus ea mente adjecerit, ut id rerum suarum esse nolle,*' in the language of the Institute.<sup>b</sup>

"When the thing whose abandonment is alleged in order to legitimize occupation belongs to the dominion of a nation, still more rigorous becomes the necessity of causing the act to rest on some positive and express manifestation of the will of the owner, showing that he does not desire to continue in possession, for in questions of territorial dominion abandonment is not to be presumed. The presumption is not that the thing is a *res nullius*, as in the case of the

<sup>a</sup>This citation seems to be inaccurate. Words conveying the meaning apparently here intended may be found in Gaius' Inst., I. IV. § 153.

<sup>b</sup>Inst. Just., II. § 47.

Institute. ‘*Insula, quæ in mari nata est, quod raro accidit, occupantis fit; nullius enim esse creditur.*’<sup>a</sup>

“If the island of Trinidad was discovered by the Portuguese, whose military occupation thereof continued until 1795; if the facts are historical (and the memory of nations excludes the idea of their being unknown); if the Government by public and positive acts has always shown its conviction that the island of Trinidad is national territory, then the condition of *res nullius*, which justifies occupation, does not exist.

“Possession is lost corpore only when the ability to dispose of a thing is rendered completely impossible, after the disappearance of the status which permits the owner to dispose of the thing possessed.

“If Brazil has not displayed by any express act the intention (*voluntade*) of abandoning the island, which had been adjudicated to the Brazilian continent by the act of this country’s acquiring its political independence; if there does not exist, as Mr. Phipps will agree, a status preventing it from disposing or making use of the island when and as it pleases; if Brazil has preserved intact, together with its dominion, its possession of that island, which is not a *res pro derelicto*, then its occupation in the name of the English Government is not a legitimate means of acquiring dominion.

“Presenting these reflections to Mr. Phipps, I believe that he will not decline to lay them before the Government of Her Majesty, the Queen of England, as a protest against the occupation of the island of Trinidad, which forms a part of Brazilian territory, and I am convinced that, after the removal of the mistaken impression that the said island was abandoned and consequently *res nullius*, that Government will issue orders for its disoccupation, which will be due homage to the principles of justice and will once more emphasize the mutual desire of the two countries, Brazil and England, to maintain unaltered the relations between them.”

Senhor Carlos de Carvalho, Brazilian min. of foreign affairs, to Mr. Phipps, British min., July 21, 1895, *For. Rel.* 1895, I. 65, 66–67.

“The friendly services of Portugal were offered in the settlement of the question . . . , and Great Britain conceded in August the rights of Brazil to the island.” (*Ann. Reg.* 1896 [398].)

## II. REVOLUTION.

### § 90.

The establishment of a new sovereignty as the result of revolution is illustrated in the case of the United Provinces of the Netherlands, or Dutch Republic, whose independence, long after its recognition by other powers, was acknowledged by Spain by the treaty concluded at

<sup>a</sup> *Inst. Just.*, II. § 22.

Munster in January, 1648; of the Swiss Cantons, which were at length admitted to representation in the Congress of Westphalia; of the United States of America;<sup>a</sup> of the Spanish American republics and Brazil;<sup>b</sup> of Belgium;<sup>c</sup> of Greece;<sup>d</sup> and of Texas.<sup>e</sup>

"The several States which composed this Union, so far at least as regarded their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign States, and they did not derive them from concessions made by the British King. The treaty of peace contains a recognition of their independence, not a grant of it. From hence it results, that the laws of the several State governments were the laws of sovereign States, and as such were obligatory upon the people of such State, from the time they were enacted."

Cushing, J., delivering the opinion of the court, in *M'Ilvaine v. Coxe's Lessees* (1808), 4 Cranch, 209, 212; S. P., *Harcourt v. Gaillard*, 12 Wheat. 527; *Henderson v. Poindexter's Lessee*, id. 530.

"It has never been admitted by the United States that they acquired anything by way of cession from Great Britain by that treaty [of 1783]. It has been viewed only as a recognition of pre-existing rights, and on that principle the soil and sovereignty within their acknowledged limits were as much theirs at the declaration of independence as at this hour. By reference to the treaty it will be found that it amounts to a simple recognition of the independence and the limits of the United States, without any language purporting a cession or relinquishment of right on the part of Great Britain. In the last article of the treaty of Ghent will be found a provision respecting grants of land made in the islands then in dispute between the two States, which affords an illustration of this doctrine. By that article a stipulation is made in favor of grants before the war, but none for those which were made during the war."

Johnson, J., *Harcourt v. Gaillard*, 12 Wheaton, 527; *Henderson v. Poindexter's Lessee*, 12 Wheaton, 530; *Lawrence's Wheaton* (1863), 37, 977.

Under the treaty with Great Britain of 1783 the United States succeeded to all the rights in that part of old Canada which now forms the State of Michigan that existed in the King of France prior to its conquest from the French by the British in 1760; and, among those rights, to that of dealing with the seigniorial estate of lands granted out as seigniories by the said king, after a forfeiture had occurred for nonfulfillment of the conditions of the fief.

*U. S. v. Repentigny*, 5 Wallace, 211.

<sup>a</sup> *Supra*, § 4.

<sup>b</sup> *Supra*, § 23 et seq.

<sup>c</sup> *Wheaton*, *Hist. of the Law of Nations*, 538-555.

<sup>d</sup> *Id.* 560-563.

<sup>e</sup> *Supra*, § 33.



“The United States regard it as an established principle of public law and of international right that when a European colony in America becomes independent it succeeds to the territorial limits of the colony as it stood in the hands of the parent country.”

Mr. Marcy, Sec. of State, to Mr. Dallas, July 26, 1856, *MS. Inst. Great Britain*, XVII. 1, 11.

In a case involving the power of a certain intendant to make a grant of lands in Mexico in November, 1821, the court said that that year “witnessed the separation of Mexico from the Kingdom of Spain,” and referred to the declaration of Mexican independence of February 24, 1821, the treaty of Cordoba of August 21, 1821, which Spain afterwards repudiated, and the surrender of the city of Mexico on September 27, 1821, by which surrender, said the court, the “declaration of independence was made good.” The provisional junta then set up promulgated, however, an order continuing in existence various officers, among whom were the intendants, so that the recognition of the authority of the intendant in the case in question, who came within the order, did not necessarily involve the determination of the exact time of the disappearance of the Spanish sovereignty in Mexico.

*Ely’s Adm. v. United States*, 171 U. S. 220.

### III. INTERNAL DEVELOPMENT.

#### § 91.

A State may gain sovereign rights by internal development. A remarkable example of such evolution is that of Japan.<sup>a</sup> Turkey, though admitted in 1856 to the advantages of the public law and system of concert of Europe, continues to exercise only a limited sovereignty.<sup>b</sup> Various examples may be found in Chapter III., *supra*, of the development of more or less organized communities into sovereign states.

### IV. EFFECTS OF CHANGE OF SOVEREIGNTY.

#### 1. ON BOUNDARIES.

#### § 92.

“At the date of the ratification of this treaty [United States and Spain, February 22, 1819] the country now constituting Texas belonged to Mexico, part of the monarchy of Spain. Subsequently, in 1824, Mexico became a separate independent power, whereby the

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<sup>a</sup> *Supra*, § 2, p. 9.

<sup>b</sup> As to the position of Turkey and the transactions of 1856, see Duggan, *The Eastern Question* (New York, 1902).

boundary line designated in the treaty of 1819 became the line between the United States and Mexico."

Harlan, J., delivering the opinion of the court, *United States v. Texas* (1892), 143 U. S. 621, 633. The statement as to the date of Mexican independence was merely made in the course of a recital of facts and did not affect the merits of the case.

## 2. ON PUBLIC LAW.

### § 93.

"Those laws of the former Government which have for their object a certain governmental public policy, of which character are laws for the disposition of the public domain and the granting of quasi-public franchises, rights and privileges to private individuals or corporations, ceased to have any force or effect after the sovereignty of the former Government ceased."

*Harcourt v. Gailliard*, 12 Wheat. 523, cited by Griggs, At.-Gen., Sept. 9, 1899, 22 Op. 574, 577; Nov. 21, 1899, 22 Op. 627, 631.

"In case of an uninhabited country newly found out by English subjects, all laws in force in England are in force there; so it seemed to be agreed. . . . They held that in the case of an infidel country their laws by conquest do not entirely cease, but only such as are against the laws of God; and that in such cases where the laws are rejected or silent, the conquered country shall be governed according to the rule of national equity." (*Blankard v. Galdy* (1693), 2 Salkeld, 411.)

"Where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws but the sovereignty of their own state; and those who live amongst them and become members of their community become also partakers of and subject to the same laws." (*Advocate-General v. Rancee Surnomoyee Dossee* (1863), 2 Moore P. C. 22.)

The term "municipal legislation" embraces only such laws as relate to the internal affairs of the country and the relation of the people to one another.

Griggs, At.-Gen., Nov. 21, 1899, 22 Op. 627, 631, citing *Davis v. Police Jury of Concordia*, 9 How. 280-289.

See, also, Richards, Acting At.-Gen., Oct. 21, 1898, 22 Op. 249.

While the United States, by the cession of Louisiana, succeeded to the sovereign rights of France and Spain in that province, this succession did not authorize the Government to exercise prerogatives inconsistent with the Constitution.

*New Orleans v. United States*, 10 Pet. 662.

The doctrine "that Congress in legislating for territory outside the boundaries of the several States of the Union is not bound by the limitations imposed by the Constitution," is maintained by Mr. Magoon, law officer, Division of Insular Affairs, War Department, *Magoon's Reports*, 37-120, 121-173.

It is true that in a treaty for the cession of territory, its national character continues for all commercial purposes, but full sovereignty for the exercise of it does not pass to the nation to which it is transferred until actual delivery. But it is also true that the exercise of sovereignty by the ceding country ceases, except for strictly municipal purposes, especially for granting lands. And for the same reason in both cases, because after the treaty is made there is not in either the union of possession and the right to the territory which must concur to give *plenum dominium et utile*. To give that there must be the *jus in rem* and the *jus in re*, or what is called in the common law of England the *juris et seisinæ conjunctio*.

Davis v. Concordia, 9 Howard, 280.

Conditions which are attached to a grant by a prior sovereign, and which are inconsistent with the policy of the United States, will not be enforced by the United States after the conquest of the territory containing the land granted.

United States v. Vaca, 18 Howard, 556.

"The 6th article of the treaty contains the following provision: 'The inhabitants of the territories which His Catholic Majesty cedes to the United States by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States.' This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the Government till Florida shall become a State."

Marshall, C. J., Am. Ins. Co. v. Canter, 1 Pet. 542, on the treaty between the United States and Spain of Feb. 22, 1819.

A nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it.

It can not be admitted that the King of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them. Every nation acquiring territory, by treaty or otherwise, must hold it subject to the laws of its own government, and not according to those of the government ceding it.

Pollard v. Hagan, 3 How. 212, 225.

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The rights and powers of sovereignty of a nation over its territory cease on the transfer of that sovereignty to another government by a cession of the territory. The power to preserve peace and order may remain in the officers previously appointed by the ceding state until the actual presence of the agents of the succeeding government, but this does not imply that sovereign power remains in the former nation.

*United States v. Reynes*, 9 Howard, 127; *Davis v. Concordia*, id. 280; *United States v. D'Auterive*, 10 Howard, 609; *Montault v. United States*, 12 id. 47.

The War Department, by a circular of Feb. 11, 1899, authorized persons holding the office of notary public in territory subject to military government by the military forces of the United States to continue to hold that office and perform its functions. (Mr. Adey, Second Assist. Sec. of State, to Mr. Rooker, Feb. 24, 1899, 235 MS. Dom. Let. 131.)

By the joint resolution of July 7, 1898, for the annexation of Hawaii, all the civil, judicial, and military powers exercised by the officers of the existing Government of the islands were vested in such persons as the President should appoint, till Congress should provide a government for the islands.

See, as to Porto Rico, the act of May 1, 1900.

The authority and jurisdiction of Mexican officials in California are to be regarded as having ceased on the 7th of July, 1846, the political department of the Government of the United States having designated that as the day when the conquest of California was completed and the Mexican officials displaced.

*United States v. Yorba*, 1 Wall. 412. See *Stearns v. United States*, 6 Wall. 589; *United States v. Pico*, 23 How. 321; *More v. Steinbach*, 127 U. S. 70.

By the conquest of California by the United States Mexican rule was displaced, and with it the authority of Mexican officials to alienate the public domain. Until Congress provided a government for the country it was in charge of military governors, who, with the aid of subordinate officers, exercised municipal authority; but the power to grant land or confirm titles was never vested in these military governors, nor in any person appointed by them.

*Alexander v. Roulet*, 13 Wallace, 386. See *Mumford v. Wardwell*, 6 id. 423.

The doctrine "that the laws of a conquered or ceded country, except so far as they may affect the political institutions of the new sovereign, remain in force after the conquest or cession till changed by him, . . . has no application to laws authorizing the alienation of any portions of the public domain, or to officers charged under the former government with that power. No proceedings affecting the rights of the new sovereign over public property can be taken except in pursuance of his authority on the subject. The cases in the supreme court of California and in this court which recognize as valid grants of lots in the pueblo or city of San Francisco by alcaldes appointed or elected after the occupation of the country by the forces of the United

States, do not militate against this view. Those officers were agents of the pueblo or city, and acted under its authority in the distribution of its municipal lands. They did not assume to alienate or affect the title to lands which was in the United States. *Welch v. Sullivan*, 8 California, 165; *White v. Moses*, 21 California, 34; *Merryman v. Bourne*, 9 Wall. 592.

“It follows from what is thus said that it would be a sufficient answer to the contention of the defendants that the grant under which they claim to have acquired a perfect title conferred none. The grantees were not invested with such title, and could not be without an official delivery of possession under the Mexican Government, and such delivery was not had, and could not be had, after the cession of the country, except by American authorities acting under a law of Congress.”

*More v. Steinbach* (1888), 127 U. S. 70, 81.

That laws relating to the alienation of the public domain pass away with the transfer of sovereignty, see *Magoon's Reports*, 467.

“It is contended that the mere change of sovereignty revoked all authority to make sales of the public lands, and *United States v. Vallejo*, 1 Black, 541, is cited, in which it was held that the decrees of the Spanish Cortes of 1813, in relation to the disposition of the crown lands, was inapplicable to the state of things which existed in Mexico after the revolution of 1820. . . . And also *More v. Steinbach*, 127 U. S. 70, 81. . . . It is doubtless true that a change of sovereignty implies a revocation of the authority vested by the prior sovereign in local officers to dispose of the public lands. And yet we think that rule is not controlling in this case, for the new sovereign made an order continuing the functions of the local officers, and one of those local officers making a sale in accordance with the provisions of the prior laws caused the money received therefrom to be paid into the treasury of the new sovereign, and that sovereign never returned the money thus received nor challenged the validity of the sale thus made.”

*Ely's Adm. v. United States* (1898), 171 U. S. 220, 230-1.

Advised, that when Spain's sovereignty was withdrawn from Porto Rico the Spanish governor-general and all other officers of the Crown of Spain, whose authority consisted in the exercise of Royal prerogatives delegated to them, ceased to exercise such authority, and that the powers possessed by them under the Royal decree of August 16, 1878, in regard to the formation of corporations did not pass to the authority of the United States.

Mr. Magoon, law officer, Division of Insular Affairs, June 14, 1899, *Magoon's Reps.* 490.

"The French occupation of the Island of Madagascar has been followed by the incorporation of the territory into the Republic as a formally proclaimed colony. This Government has been assured of the fullest extension to American citizens and interests in that quarter of all rights and privileges under the treaties between the United States and France. The extraterritorial jurisdiction of our agents in Madagascar will accordingly be relinquished as fast as effectively replaced by the jurisdiction of established French courts.

"An important commerce, fostered by treaties with the Hova Government, had been built up by American interests during recent years, and it remains to be seen whether the natural advantages of that traffic will outweigh the reserved trade of the colony with the mother country or enable it to enter into successful competition with the trade of other countries which enjoy the reciprocal benefits of the minimum customs tariff of France."

Report of Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxvii.

"The establishment of French sovereignty and civil jurisdiction over the island of Madagascar puts an end to the extraterritorial rights of the United States in that country, and to the judicial powers of our consul dependent thereon. This changed condition is assumed to have gone into effect on the 16th of October, when, according to the statement of the French resident-general, the French courts were to have been opened for business."

Mr. Olney, Sec. of State, to Mr. Eustis, ambassador to France, Dec. 10, 1896, For. Rel. 1897, 152, 153.

The French minister of the colonies instructed the French resident-general to give all facilities to the foreign consuls for settling the cases brought before their courts before October 16, 1896. (For. Rel. 1897, 154.)

"I have the honor to acknowledge your note of yesterday's date, asking information concerning the recognition of the consular officer of your government in Hawaii by the Government of the United States.

"Foreign consuls in the Hawaiian Islands may exercise their functions under the provisional régime now existing in Hawaii, but in consideration of the change of government there, it would be as well for the governments of such consuls to send their new credentials at a convenient time, upon which new exequaturs will be issued by the Government of the United States.

"With regard to your further inquiry touching the recognition of consuls in Puerto Rico, and the occupied ports of Cuba, I beg to state that, the territory of Puerto Rico being under the military control of the United States until Congress shall make other provision, there would seem to be no objection to the consuls of your Government continuing for the present, to act in their official capacity under existing

exequaturs. As to Cuba, a similar course may be permitted for the time being."

Mr. Hay, Sec. of State, to Mr. Grip, Swedish min., November 17, 1898, MS. Notes to Swedish Legation, VIII. 109.

See, also, as to the provisional recognition of consuls in the Philippines, Mr. Hay, Sec. of State, to the Sec. of War, March 26, 1900, 244 MS. Dom. Let. 19.

Official recognition was accorded by the United States to foreign consuls in Porto Rico upon receipt of their commissions addressed to the President of the United States, or "to whom it may concern," and they were meanwhile permitted to act temporarily pending the receipt of their commissions, if a request was made in the usual way through the proper legation at Washington. (Mr. Hay, Sec. of State, to Mr. Allen, Gov. of Porto Rico, May 23, 1900, 245 MS. Dom. Let. 232.)

The diplomatic representatives at Washington of the various governments having consuls in the Philippines were requested to ascertain the wishes of their governments as to the formal recognition of such officers by the United States, they holding over meanwhile and being allowed to discharge their duties. (Mr. Hay, Sec. of State, to the Sec. of War, Jan. 22, 1901, 250 MS. Dom. Let. 341.)

On the annexation of the Hawaiian Islands by the United States the laws of Hawaii for the registration of vessels ceased to operate, and the national character of Hawaiian vessels became American.

Griggs, At.-Gen., Sept. 12, 1899, 22 Op. 578.

By the act of April 12, 1900, in relation to the government of Porto Rico, the Commissioner of Navigation was empowered to make such regulations, subject to the approval of the Secretary of the Treasury, as he might deem expedient for the nationalization of all vessels owned by the inhabitants of Porto Rico on April 11, 1899, the date of the exchange of the ratifications of the treaty of cession, and which continued to be so owned up to the time of such nationalization, and for their admission to all the benefits of the coasting trade of the United States.

By the joint resolution of annexation the public property of Hawaii, including the public lands, became vested in the United States, and the officials of Hawaii were thenceforth without power to convey a title, legal or equitable, to such lands. In this respect the resolution is to be considered as having taken effect on July 7, 1898, the day of its approval by the President, and not on Aug. 12, 1898, the day on which the ceremonies of the formal transfer of possession took place.

Griggs, At.-Gen., Nov. 21, 1899, 22 Op. 627. S. P., Griggs, At.-Gen., Sept. 9, 1899, 22 Op. 574.

It was advised that the inhabitants of the Hawaiian Islands, after annexation, were not entitled to the benefits of the United States copyright laws, in the absence of affirmative legislation by Congress.

Griggs, At.-Gen., Dec. 2, 1898, 22 Op. 268.

The power to dispose permanently of the public lands and property in Porto Rico rests in Congress, and, in the absence of a statute conferring such power, can not be exercised by the Executive Departments of the Government.

During the military control of Porto Rico leave or license may be granted an individual to make temporary use of portions of the public domain.

The grant of a right or privilege to exist in perpetuity, or as long as the conditions of the grant are fulfilled, for the erection of a pier at Ponce, Porto Rico, is beyond the power of the Secretary of War, and ought not to be made,

Syllabus, Griggs, At.-Gen., July 26, 1899, 22 Op. 544.

By Executive order promulgated by the general commanding the United States forces in Cuba, all grants and concessions of franchises and similar rights were forbidden to be made by any authority in the island, except upon the approval of the Secretary of War.

Griggs, At.-Gen., March 25, 1899, 22 Op. 408.

In affirmation of the policy declared by the Executive, Congress, by an act of March 3, 1899, directed that no property, franchises, or concessions of any kind whatsoever should be granted by the United States or by any military or other authority in the island of Cuba during the occupation thereof by the United States. While the power of Congress to control the Executive in the matter was doubted, yet it was advised that as the act was in harmony with the Executive policy, it would be inexpedient to grant permission for the landing of a cable in Cuba, especially as the solicited concession was alleged to be in violation of the existing rights of another company.

Griggs, At.-Gen., March 25, 1899, 22 Op. 408.

On the cession of territory by one nation to another, those internal laws and regulations of the former designated as municipal continue in force and operation until the new sovereign imposes different laws and regulations.

The laws which are political in their nature, and pertain to the prerogatives of the former government, immediately cease upon the transfer of sovereignty.

Any inchoate rights or grants made by a municipal body in Cuba under Spanish sovereignty, which for their completion require the assent or approval of the Crown or its officers, in the absence of such assent or approval made prior to the treaty of cession, are ineffective and incomplete.

In the exercise by the United States of the powers of municipal government, it may change or modify the form or constitutions of the



municipal establishment, and in this exercise of sovereignty may provide the method, terms, and conditions under which internal improvements may be carried on, or forbid them to be carried on, although inchoate or even completed contracts therefor have previously been entered into.

Any rights of Dady & Co., for the construction of certain works in Havana, if vested, are preserved by the treaty of Paris.

Syllabus, Griggs, At.-Gen., July 10, 1899, 22 Op. 526.

"If Michael J. Dady & Co. had, at the time the treaty of Paris was signed, any rights under their alleged contract which can properly be called vested rights, those rights are undoubtedly preserved by the terms of the treaty."

The continuance of military government in the islands ceded by Spain to the United States, after the exchange of the ratification of the treaty of peace, by which the cession was made, was in harmony with the theory previously accepted and approved by the executive, legislative, and judicial branches of the Government of the United States.

Report of Mr. Magoon, law officer, Division of Insular Affairs, War Department, Oct. 19, 1899, Magoon's Reports, 11, 19.

The views set forth in this report were approved by the Secretary of War, and were acted upon by the War Department in the government of the islands.

### 3. ON REVENUE LAWS.

#### § 94.

On the cession of Florida to the United States the jurisdiction and authority of the former sovereign continued in full force until possession of the ceded territory had actually passed. It follows that an importation of goods into the Floridas after the cession, but previously to the delivery of possession, was an affair between the importer and the Spanish Government, of which the Government of the United States had no right to complain.

But goods carried into a port of Florida before the delivery of possession, remaining in port on shipboard until after delivery and then brought into the United States, having never been entered in the Spanish custom-houses, would be subject to the revenue laws of the United States.

1 Op. 483, Wirt, 1821.

When Florida was ceded to the United States and possession of it had actually been taken it was held by the Secretary of the Treasury, whose opinion was sanctioned by the Attorney-General, that, under our revenue laws, its ports must be regarded as foreign until they were established as domestic by an act of Congress.

Fleming v. Page, 9 Howard, 603.

The mere fact that a territory has been ceded by one sovereignty to another does not open it to a free commercial intercourse with the world as a matter of course until the new possessor has prescribed by legislation some terms upon which intercourse may be conducted.

*Cross v. Harrison*, 16 Howard, 164.

“I understand the decision of the Supreme Court of the United States in the case of *Harrison v. Cross* (16 Howard, 164–202) to declare its opinion that upon the addition to the United States of new territory by conquest and cession, the acts regulating foreign commerce attach to and take effect within such territory *ipso facto*, and without any fresh act of legislation expressly giving such extension to the pre-existing laws. I can see no reason for a discrimination in this respect between acts regulating foreign commerce and the laws regulating intercourse with the Indian tribes. There is, indeed, a strong analogy in the two subjects. The Indians, if not foreigners, are not citizens, and their tribes have the character of dependent nations under the protection of this Government. As Chief Justice Marshall remarks, delivering the opinion of the Supreme Court in *Worcester v. The State of Georgia* (6 Peters, 557) ‘the treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States, and provide that all intercourse with them shall be carried on exclusively by the Government of the Union.’

“The same clause of the Constitution invests Congress with power ‘to regulate commerce with foreign nations . . . and with the Indian tribes.’

“The act of June 30, 1834 (4 Stat. 729), defines the ‘Indian country’ as, in fact, ‘all that part of the United States west of the Mississippi and not within the States of Missouri and Louisiana, or the Territory of Arkansas.’ This, by a happy elasticity of expression, widening as our domain widens, includes the territory ceded by Russia.”

Mr. Seward, Sec. of State, to Mr. Schofield, Jan. 30, 1869, 80 MS. Dom. Let. 220.

When territory is acquired by treaty or conquest, or otherwise, its relation to the nation acquiring it depends upon the laws of that nation, unless controlled by the instrument of cession.

In the resolution annexing the Hawaiian Islands Congress affirmatively indicated its intent that such laws as our tonnage-tax laws are to remain undisturbed until it shall provide a form of government for such islands, or until the commission shall advise and Congress shall enact legislation therefor.

The fact that the Hawaiian Islands have been annexed to the United States does not relieve vessels from such ports from being considered as from foreign ports and as coming under the laws governing tonnage tax.

Griggs, At.-Gen., July 22, 1898, 22 Op. 150.

In territory held by conquest, the military authorities in possession, in the absence of legislation by Congress, may make such rules or regulations and impose such duties upon merchandise imported into the conquered territory as they may deem wise and prudent.

The admission of merchandise into the ports of the United States from such conquered territory is governed solely by existing laws passed by Congress, and the President has no power to add to or detract from the force and effect of such laws.

Merchandise from the island of Porto Rico introduced into the ports of the United States is by law required to pay the same duties that would be charged upon merchandise imported from a foreign country, and the President has no authority to alter or modify the laws under which such duties are required to be paid.

Griggs, At.-Gen., Aug. 10, 1899, 22 Op. 560.

In July, 1898, Porto Rico was invaded by the military forces of the United States under General Miles.

August 12 a protocol between the United States and Spain was signed at Washington, which provided for the suspension of all hostilities, the evacuation of Porto Rico by Spain, and the negotiation of a treaty of peace which should include a cession of the island. (30 Stat. 1742.)

October 18 Porto Rico was evacuated by the Spanish forces.

December 10 a treaty of peace, by which the island was ceded to the United States, was signed at Paris.

February 6, 1899, the treaty was ratified by the President and Senate; March 19, by the Queen Regent of Spain; and, April 11, the ratifications were exchanged at Washington.

March 2 an act was passed by Congress making an appropriation to carry out the obligations of the treaty.

April 12, 1900, an act was passed, commonly called the Foraker Act, to provide temporary revenues and a civil government for Porto Rico. It took effect May 1, 1900. It imposed certain duties on goods going into Porto Rico from the United States, or coming into the United States from Porto Rico, but provided that they should in any event cease on March 1, 1902, or sooner if the legislative assembly of Porto Rico should enact and put into operation a system of local taxation to meet the necessities of the insular government.<sup>a</sup>

Between the invasion of Porto Rico by the United States forces and the taking effect of the Foraker Act, duties were levied on commerce between the United States and Porto Rico as follows:

In Porto Rico, from July 26 to August 19, 1898, under a proclamation of General Miles, continuing the former Spanish and Porto

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<sup>a</sup> By a proclamation of July 25, 1901, President McKinley announced that such a system had been enacted and put into operation. By the terms of the act of April 12, 1900, all tariff duties as between the United States and Porto Rico ceased from and after the making of the President's proclamation.

Rican duties; from August 19, 1898, to February 1, 1899, under a customs tariff proclaimed by the President; from February 1, 1899, to May 1, 1900, when the Foraker Act took effect, under an amended tariff promulgated January 20, 1899, by order of the President.

In the United States, down to May 1, 1900, duties were collected under the general tariff laws.

# I.

A suit was brought to recover back duties paid in the United States, under protest, on importations of sugar from Porto Rico in the autumn of 1899, after the exchange of the ratifications of the treaty of peace.

*De Lima v. Bidwell.*

Brown, J., delivering the opinion of the court, said:

1. That the question whether the duties were lawfully collected depended solely upon the question whether Porto Rico was then a "foreign country," the United States tariff of July 24, 1897, commonly called the Dingley Act, providing that certain duties should be collected on "all articles imported from foreign countries."

2. That a foreign country was defined by Chief Justice Marshall and Mr. Justice Story as one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States.<sup>a</sup>

3. That Porto Rico, ceded to and exclusively occupied and administered by the United States, seemed to be a domestic territory; but it was insisted that the island remained a "foreign country" under the tariff laws till embraced by Congress within the general revenue system.

4. That in *United States v. Rice*, 4 Wheat. 246, it was held that an action would not lie for duties on goods imported into Castine, Maine, during its occupation by the British in the war of 1812, the goods not being liable to American duties where imported, and no new right vesting in the United States on the reoccupation of the place.

5. That, somewhat conversely, in *Fleming v. Page*, 9 How. 603, it was held that duties could not be recovered back which were paid on goods imported from Tampico, Mexico, when it was temporarily occupied by the United States during the Mexican war, it never having been ceded to the United States and never having ceased to be a foreign country. This was sufficient for the decision; but Chief Justice Taney, who delivered the opinion, proceeded to put the case on another ground, that, by the uniform construction of the tariff laws by the Treasury Department, as shown in the cases of Louisiana and Florida, no place in a newly acquired country was recognized as a domestic port, from which the coasting trade might be carried on, till Congress had passed an act establishing a custom-house there and authorizing the appointment of a collector.

<sup>a</sup>The *Boat Eliza*, 2 Gall. 4; *Taber v. United States*, 1 Story, 1; *The Ship Adventure*, 1 Brock. 235, 241.

6. That in *Cross v. Harrison*, 16 How. 164, the plaintiff, acting upon the dictum in *Fleming v. Page*, sought to recover back duties paid to the acting collector at San Francisco, who was appointed by the military governor of California, on goods imported from foreign countries, between February 2, 1848, the date of the treaty of peace between the United States and Mexico, and November 13, 1849, when the collector appointed by the President, under an act of Congress of March 3, 1849, entered upon the discharge of his functions. The court, Wayne, J., delivering the opinion, held that California, after the cession, became "instantly bound and privileged by the laws of the United States as to duties on imports and tonnage;" and, while citing the cases of Louisiana and Florida and ostensibly taking a different view of the facts from that expressed in *Fleming v. Page*, distinctly repudiated, with the apparent acquiescence of Taney, who still remained Chief Justice, the doctrine that the port retained its foreign character till Congress had acted. The goods, it is true, were imported into San Francisco from foreign countries, but it was impossible to escape the conclusion that goods carried from San Francisco to New York after the ratification of the treaty would not have been considered as imported from a foreign country.

7. That the practice of the executive departments, as shown in the cessions of Louisiana, Florida, Texas, California, and Alaska, was, with the single exception of Louisiana, where, under an order of Mr. Gallatin, Secretary of the Treasury, the prior duties were continued till Congress acted in 1804, strictly in line with the decision in *Cross v. Harrison*.

8. That the construction of the legislative department was shown in the Foraker Act, which distinguished between Porto Rico and foreign countries, by enacting (sec. 2) that the same duties should be paid on "all articles imported into Porto Rico from ports other than those of the United States, which are required by law to be collected upon articles imported into the United States from *foreign countries*."

9. That by this résumé it appeared that since Mr. Gallatin's order in 1803, "there is not a shred of authority, except the dictum in *Fleming v. Page* (practically overruled in *Cross v. Harrison*) for holding that a district *ceded to and in the possession of* the United States remains for any purpose a foreign country."

10. That, were the question presented as an original one, the court "would be impelled irresistibly to the same conclusion."

11. That by the Constitution a treaty is a supreme law of the land; that one of the ordinary incidents of a treaty is the cession of territory;<sup>a</sup> that, by the treaty of Paris, Porto Rico "became territory of the United States—although not an organized territory in the technical sense of the word;" and that whatever might be the source of

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<sup>a</sup>Marshall, C. J., in *Am. Ins. Co. v. Canter*, 1 Pet. 511, 542.

Congress' power to govern territory, it was settled law that territory, when once acquired by treaty, "belongs to the United States, and is subject to the disposition of Congress."

12. That the contention that territory thus acquired "can remain a foreign country under the tariff laws" assumed either (1) that the word foreign applied under all changes to such countries as were foreign when the law was enacted, or (2) that they remained foreign till Congress "has formally embraced them within the customs union of the States." The first assumption was obviously untenable; while the second presupposed both "that a country may be domestic for one purpose and foreign for another," and that such country, although everything might be done in it which a government can do within its own boundaries, might remain indefinitely, till Congress enacted otherwise, a foreign country. The Constitution furnished no warrant for such views; and the court could not acquiesce in the "assumption that a territory may be at the same time both foreign and domestic."

13. That the court could not consider the provisions of the act of Congress of March 24, 1900, "applying for the benefit of Porto Rico duties collected in the United States on importations from the island after its evacuation by Spain, as a declaration by Congress that Porto Rico remained as to the tariff laws a foreign country.

14. That the court therefore held that, in the autumn of 1899, "Porto Rico was not a foreign country within the meaning of the tariff laws but a territory of the United States," and that the duties sued for should be refunded; and the judgment of the court below was reversed.

McKenna, J. (with whom Shiras and White, JJ., concurred), dissented, maintaining:

1. That, between the extreme views (1) that Porto Rico, when the duties were levied, remained as much a foreign country as it was before the war with Spain, and (2) that it was as much domestic territory as New York, there were other relations, one of which was occupied by the island, and that for this view there existed the authority of the organ of the court's present opinion, who, in *Downes v. Bidwell* (*infra*), held, against the dissent of the judges who agreed with him in the present case, that Porto Rico, though domestic territory, might be legally subjected to tariff duties.

2. That the principle on which *Fleming v. Page* was decided, as stated in the opinion of Chief Justice Taney, remained a proper principle for judicial application, and should not be discarded as dictum.

3. That Gouverneur Morris, who wrote the provision of the Constitution which empowers Congress "to dispose of and make all needful rules and regulations respecting the territory or other property of the

United States," afterwards declared that it was intended to confer power to govern territory as "provinces and allow them no voice in our councils," and in his mind it certainly contemplated after-acquired territory. In *Scott v. Sanford*, 19 How. 393, it was declared to be confined to previously acquired territory. This conflict of views was but an incident in the evolution of opinion. But distinctions always existed "between territory which might be acquired (whether by purchase or by conquest) and that which was within the acknowledged limits of the United States, and also that which might be acquired by the establishment of a disputed line"—distinctions which were conspicuous in the opinion of Mr. Justice Johnson, at circuit, in *American Insurance Co. v. Canter*, 1 Pet. 511. Mr. Webster, in his argument of that case before the Supreme Court, said: "What is Florida? It is no part of the United States. How can it be? How is it represented? Do the laws of the United States reach Florida? Not unless by particular provision." And, responding to the argument, the court, through Chief Justice Marshall, decided that the judicial power of the United States, as declared by the Constitution, did not extend to Florida.

4. That the court in *Cross v. Harrison* did not hold that the tariff laws of the United States became immediately operative in California upon the ratification of the treaty of peace, independently of the exercise of the President's discretion in putting them in force. On the contrary, it held that California remained, even after the ratification of the treaty, under the government which the President had in the exercise of belligerent rights instituted during the war. And as it was thus admitted that there was, after the cession, an interval of time during which the laws of Congress did not apply, to whom does it belong to determine what the duration of that interval shall be? Clearly to the political, and not to the judicial, department of the Government. But, conceding, merely for the sake of the argument, the contrary, the decision rested on the provisions of the treaty of peace. The statement of Mr. Justice Wayne that territory ceded to the United States becomes "instantly bound and privileged," etc., was immediately accompanied by the qualification "as there is nothing differently stipulated in the treaty in respect to commerce." The cession of California was effected by a definition, in the treaty, of the "boundaries of the United States," and it was to this act of incorporation that Mr. Justice Wayne referred when he said that "after the ratification of the treaty, California became a part of the United States." The treaty with Spain, on the contrary, expressly declared that the status of the ceded territory should be determined by Congress.

5. That, as to executive practice, if there was one legal exception, such as was admitted to exist in the case of Louisiana, it destroyed the

alleged rule. Nor was the Louisiana precedent inconsistent with *Cross v. Harrison*, correctly interpreted. Even after the admission of Texas as a State, it was deemed necessary to extend the laws of the United States to her.<sup>a</sup> She was an example, as was Florida, of what Congress believed to be necessary, and Oregon and Alaska were like examples.

6. That the opinion in the case at bar assumed that the cession of Porto Rico was unconditional, but that necessarily depended upon the terms of the treaty. To set the word "foreign" in antithesis to the word "domestic" proved nothing. The question was simply whether a particular tariff law applied; and to answer this in the affirmative on the ground that by the Constitution all laws, and particularly all customs laws, apply, in spite of any provisions in the treaty of cession, was to introduce a restrictive principle fraught with grave consequences.

Mr. Justice Gray also dissented, on the ground that the judgment of the court appeared to be "irreconcilable with the unanimous opinion of this court in *Fleming v. Page*, 9 How. 603, and with the opinions of the majority of the justices in the case, this day decided, of *Downes v. Bidwell*."

*De Lima v. Bidwell* (May 27, 1901), 182 U. S. 1.

## II.

An action was brought to recover back duties paid under protest on certain oranges imported at New York from Porto Rico in November, 1900, after the Foraker Act took effect.

*Downes v. Bidwell.*

Mr. Justice Brown, in announcing "the conclusion and judgment" of the court, said:

1. That it having been decided that upon the ratification of the treaty of peace Porto Rico "ceased to be a foreign country, and became a territory of the United States," the question remained whether it became "a part of the *United States*" within the clauses of the Constitution which declare that "all duties, imposts, and excises shall be uniform throughout the United States,"<sup>b</sup> and that "vessels bound to or from one State" can not "be obliged to enter, clear, or pay duties in another;" or, more broadly, "whether the revenue clauses of the Constitution extend of their own force to our newly acquired territories."

2. That, neither in the Articles of Confederation, nor in the ordinance of 1787, nor in the Constitution itself, was there anything from which it could be inferred that the territories were considered a part of the United States. "The Constitution was created by the people of the *United States*, as a union of *States*, to be governed solely by representatives of the *States*;" and the clauses in question are explained by others which expressly relate to the States.

<sup>a</sup>9 Stat. 1.

<sup>b</sup>Art. 1, sec. 8.



3. That two provisions of the treaty ceding Louisiana were specially attacked on constitutional grounds—(1) that for the ultimate incorporation of the territory into the Union, and (2) that by which French and Spanish ships were accorded for twelve years an exclusive preference as to duties in the ports of the ceded territory over the ships of other foreign countries. The statutes passed to carry the treaty into effect may be taken as expressing the view of Congress that these stipulations were lawful, though discriminations as to duties could be supported only on the theory that ports of territories were not ports of States within the meaning of the Constitution. The view that the Constitution did not extend to them of its own force was exhibited in the legislation of Congress touching all the Territories carved out of the Louisiana cession. This view is consistently recognized in the legislation of Congress. Stipulations similar to those in the Louisiana treaty were afterwards incorporated into the treaty by which Florida was acquired. Discriminative clauses as to duties may also be found in the act annexing Hawaii, and in the treaty of peace with Spain.<sup>a</sup>

4. That the decisions of the Supreme Court on the question of the extension of the Constitution to the territories had not been altogether harmonious; but that, eliminating expressions not necessary to the case (as in *Loughborough v. Blake*), the following propositions might be considered as established: (1) That the District of Columbia and the territories are not States within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different States;<sup>b</sup> (2) that Territories are not States within the meaning of the Revised Statutes, § 709, permitting writs of error from the Supreme Court where the validity of a State statute is drawn in question;<sup>c</sup> (3) that the District of Columbia and the Territories are States, as that word is used in international treaties with respect to the ownership, disposition, and inheritance of property;<sup>d</sup> (4) that the Territories are not within the clause of the Constitution providing for the creation of a Supreme Court and such inferior courts as Congress may see fit to establish;<sup>e</sup> (5) that the Constitution does not apply to foreign countries or to trials therein conducted, and that Congress may lawfully provide for such trials before consular tribunals without a grand or petit jury;<sup>f</sup> (6) that where territory has once become subject to the Constitution, as the District of Columbia prior to its cession by Maryland and Virginia

<sup>a</sup> Arts. 4 and 13.

<sup>b</sup> *Hepburn v. Elzey*, 2 Cr. 445; *Barney v. Baltimore*, 6 Wall. 280; *Hooe v. Jamieson*, 166 U. S. 395; *New Orleans v. Winter*, 1 Wheat. 91.

<sup>c</sup> *Scott v. Jones*, 5 How. 343; *Miners' Bank v. Iowa*, 12 How. 1.

<sup>d</sup> *Geofroy v. Riggs*, 133 U. S. 258.

<sup>e</sup> *Am. Ins. Co. v. Canter*, 1 Pet. 511; *Benner v. Porter*, 9 How. 235; *Clinton v. Englebrecht*, 13 Wall. 434; *Good v. Martin*, 95 U. S. 90, 98; *McAllister v. United States*, 141 U. S. 174.

<sup>f</sup> *Ross' Case*, 140 U. S. 453.

to the United States, or where the Constitution has once been formally extended by Congress to territories, it is fixed irrevocably, and neither Congress nor the territorial legislature can enact laws inconsistent with it.<sup>a</sup>

5. That the power over the territories is vested in Congress without limitation is asserted in various cases.<sup>b</sup>

6. That the opinion of Chief Justice Taney, in *Dred Scott v. Sanford*, 19 How. 393, if taken at its full value, is decisive in favor of the other view; but, when he uttered his opinion on the merits, he had already disposed of the case on the ground of jurisdiction; and by subsequent events the authority of the case was seriously impaired. Moreover, the question which it involved, of the power to prohibit slavery in the territories, is so different, in its constitutional and other aspects, from that of duties, as to be scarcely analogous.

7. That, to sustain the power to levy duties, it is not necessary to show that none of the articles of the Constitution applies to Porto Rico; that some prohibitions, such as those inhibiting bills of attainder and titles of nobility, incapacitate Congress to pass a bill *of that description*; and that (although the point was only suggested and not decided) a distinction might in this respect be drawn between certain "natural rights," enforced in the Constitution by prohibitions against interference with them, (such as rights of religion, of individual liberty and property, of free speech and a free press, of access to the courts, of due process of law and the equal protection of the laws, and immunities such as are essential to free government,) and what may be termed artificial or remedial rights (such as citizenship and the suffrage, and particular methods of procedure).

8. That, in various statutes—e. g., act of Congress of March 27, 1804, 2 Stat. 298, and Rev. Stats. § § 905, 906—and in the Thirteenth Amendment to the Constitution, it is implied "that there may be territories subject to the jurisdiction of the United States, which are not of the United States."

9. That the object of the various constitutional provisions requiring uniformity and forbidding discriminations in taxes and duties throughout the United States "was to protect the States which united in forming the Constitution from discriminations by Congress which would operate unfairly or injuriously upon some States and not equally upon others."<sup>c</sup>

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<sup>a</sup> *Loughborough v. Blake*, 5 Wheat. 317; *Callan v. Wilson*, 127 U. S. 540; *Webster v. Reid*, 11 How. 437; *Springville v. Thomas*, 166 U. S. 707; *Am. Pub. Co. v. Fisher* 166 U. S. 464; 173 U. S. 343.

<sup>b</sup> *McCullough v. Maryland*, 4 Wheat. 316, 422; *United States v. Gratiot*, 14 Pet. 526; *Mormon Church v. United States*, 136 U. S. 1. See, also, *National Bank v. County of Yankton*, 101 U. S. 129; *Murphy v. Ramsey*, 114 U. S. 15.

<sup>c</sup> *Knowlton v. Moore*, 178 U. S. 41.

10. That the "practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct."

11. That "the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be."

12. On these grounds the opinion was expressed that the island of Porto Rico "is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff can not recover back the duties exacted in this case."

Mr. Justice White, with whom concurred Justices Shiras and McKenna, united in the judgment announced by Mr. Justice Brown, but for reasons "different from, if not in conflict with, those expressed" by the latter. The grounds maintained by Mr. Justice White were as follows:

1. That it should at the outset be conceded (1) that, as the Government of the United States was born of the Constitution, all its powers must be derived, either expressly or by implication, from that instrument;<sup>a</sup> (2) that consequently the Constitution "is everywhere and at all times potential in so far as its provisions are applicable;"<sup>b</sup> (3) that, wherever a power is given and a limitation imposed upon it, the restriction "operates upon and confines every action on the subject within its constitutional limits;"<sup>c</sup> (4) that, where the Constitution applies, its controlling interest can not be frustrated by the action of any or all of the departments of the Government; (5) that the Constitution has conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States, but that, even where no express limitation may be applicable, there may be restrictions of so fundamental a nature that, although not expressed in words, they can not be transgressed;<sup>d</sup> (6) that as Congress, in governing the territories, is subject to the Constitution, all its applicable provisions are, as held even by the dissenting judges in

<sup>a</sup>*Marbury v. Madison*, 1 Cranch, 176; *Martin v. Hunter*, 1 Wheat. 326; *New Orleans v. United States*, 10 Pet. 662, 736; *Geofroy v. Riggs*, 133 U. S. 258, 266; *United States v. Gettysburg Electric Ry.*, 160 U. S. 688, 679, and cases cited.

<sup>b</sup>*The City of Panama*, 101 U. S. 453, 460; *Fong Yue Ting v. United States*, 149 U. S. 716, 738.

<sup>c</sup>*Monongahela Navigation Co. v. United States*, 148 U. S. 312, 336; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 479; *United States v. Joint Traffic Association*, 171 U. S. 571.

<sup>d</sup>*United States v. Kagama*, 118 U. S. 375, 378; *Shively v. Bowlby*, 152 U. S. 1, 48.

the *Dred Scott* case,<sup>a</sup> controlling therein; (7) that in every case, when a constitutional provision is invoked, the question is, not whether the Constitution is operative, which is self-evident, but whether the particular provision is applicable; (8) that the clauses empowering Congress "to lay and collect taxes, duties, imposts, and excises," and requiring uniformity throughout the United States, although they do not relate to or restrain the power of Congress to levy local taxes for local purposes within the territories, restrain Congress from imposing duties on goods coming into the United States from a territory which has been incorporated into and forms a part thereof.<sup>b</sup>

2. That the determination whether a particular provision is applicable involves, generally speaking, an inquiry into the situation of the territory and its relations to the United States; e. g., it has been held, even in the case of incorporated territories, that, while the provision as to the life tenure of judges is inapplicable, the provision as to common law juries is operative,<sup>c</sup> although the latter provision has been held inapplicable in consular courts.<sup>d</sup>

3. That a distinction exists between restrictions which regulate a granted power and those which withdraw all authority, and that the "absolute withdrawals of power which the Constitution has made in favor of human liberty are applicable to every condition or status."<sup>e</sup>

4. That the sole issue therefore was whether the tax in question was levied in violation of the Constitution; and this depended upon whether Porto Rico had, when the act was passed, "been incorporated into and become an integral part of the United States."

5. That every government which is sovereign within its sphere of action possesses the inherent power to acquire territory by discovery, treaty, or conquest, and "that, under the Constitution, the Government of the United States, in virtue of its sovereignty, supreme within the sphere of its delegated power, has the full right to acquire territory enjoyed by every other sovereign nation."<sup>f</sup>

<sup>a</sup> 19 How. 393, 542, 614.

<sup>b</sup> *Loughborough v. Blake*, 5 Wheat. 317, 322; *Woodruff v. Parham*, 8 Wall. 123, 133; *Brown v. Houston*, 114 U. S. 622, 628; *Fairbank v. United States*, 181 U. S. 283.

<sup>c</sup> *American Ins. Co. v. Canter*, 1 Pet. 511; *Benner v. Porter*, 9 How. 235; *Webster v. Reid*, 11 How. 437, 460; *Clinton v. Englebrecht*, 13 Wall. 434; *Reynolds v. United States*, 98 U. S. 145; *Callan v. Wilson*, 127 U. S. 540; *McAllister v. United States*, 141 U. S. 174; *Springville v. Thomas*, 166 U. S. 707; *Baumann v. Ross*, 167 U. S. 548; *Thompson v. Utah*, 170 U. S. 343; *Capital Traction Co. v. Hof*, 174 U. S. 1; *Black v. Jackson*, 177 U. S. 363.

<sup>d</sup> *In re Ross*, 140 U. S. 453, 461, 462, 463.

<sup>e</sup> 20 Congressional Globe, Appendix, 272, 281-282; *Stanwood*, *History of the Presidency*, 218, 253, 254, 271; *Chicago, Rock Island, &c., R. R. Co. v. McGlinn*, 114 U. S. 542, 546.

<sup>f</sup> *Halleck*, *International Law*, 76, 126, 814; *American Ins. Co. v. Canter*, 1 Pet. 511; *United States v. Huckabee*, 16 Wall. 414, 434; *Mormon Church v. United States*, 130 U. S. 1; *Shively v. Bowlby*, 152 U. S. 50; 26 Stat. 1497.

6. That, by the general principles of the law of nations, acquired territory, in the absence of an agreement to the contrary, will bear such relation to the acquiring government as may be by it determined, that this power is "absolutely inherent in and essential to national existence," that it belongs to the United States under the Constitution, and that it may be exercised by Congress in time of peace as well as by the military arm in time of war."

7. That the theory that the treaty-making power can not acquire territory conditionally is refuted by the history of the United States from the beginning.

8. That, when the Constitution was adopted, the United States consisted, both in the international and the domestic sense, of States and territories whose native white inhabitants were endowed with citizenship and possessed various common rights and privileges; that the opinion which prevailed in the Louisiana cession was, that, although the treaty might stipulate for incorporation and citizenship under the Constitution, such agreements were but promises, depending for their fulfillment on the future action of Congress; that a similar view prevailed in the acquisition of Florida; that the rule acted upon in the case of the Mexican territory was that, where the treaty in express terms brought the territory within the boundary of the United States and provided for incorporation, and the treaty was expressly or impliedly recognized by Congress, its provisions ought to be given immediate effect; that the same rule was acted upon in the case of Alaska, the treaty of cession containing, among other things, an express provision excluding from citizenship the uncivilized native tribes; and that the Thirteenth Amendment, which speaks of "the United States, or any place subject to their jurisdiction," obviously recognizes that there may be places subject to the jurisdiction of the United States which are not incorporated into it.

9. That it is indubitably settled by the principles of the law of nations, by the nature of the government created by the Constitution, by the express and implied powers conferred upon that government, by the mode in which those powers have been exercised, and by an unbroken line of judicial decisions, that the treaty-making power can not incorporate territory into the United States without the express or implied assent of Congress; that it may insert in a treaty conditions against immediate incorporation, although, when the treaty contains conditions favorable to incorporation, they will, if the treaty be not repudiated by Congress, have the force of a law of the land and by their fulfillment cause incorporation to result.

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<sup>a</sup>Johnson v. McIntosh, 8 Wheat. 543, 595; Martin v. Waddell, 16 Peters, 367, 409; Jones v. United States, 137 U. S. 202, 212; Shively v. Bowlby, 152 U. S. 1, 50; Fleming v. Page, 9 How. 603; Cross v. Harrison, 16 How. 164.

10. That the treaty of Paris did not stipulate for the incorporation of Porto Rico, but expressly provided that the "civil rights and political status of the native inhabitants" should be determined by Congress; and that the provisions of the act of Congress, under which the duty in question was imposed, manifested the intention of Congress that for the present the island should not be incorporated into the United States.

11. That, in consequence, while in an international sense Porto Rico was not a foreign country, it was foreign to the United States in a domestic sense, and, not having been incorporated into the United States, was "merely appertaining thereto as a possession."

12. That, as a necessary consequence, the impost assessed on merchandise going from Porto Rico into the United States after the cession was within the power of Congress, the clause requiring imposts to be uniform "throughout the United States" not being applicable to it.<sup>a</sup>

Mr. Justice Gray, concurring in the judgment of the court, "and in substance agreeing with the opinion of Mr. Justice White," observed (1) that the Government of the United States possessed the power of acquiring territory either by conquest or by treaty;<sup>b</sup> (2) that, where territory is acquired by war, there must of necessity be a "transition period" between military government, under the control of the President as commander in chief, and civil government, which "can only be put in operation by the action of the appropriate political department of the Government, at such time and in such degree as that department may determine;" (3) that, although in such case "civil government must take effect either by the action of the treaty-making power or by that of the Congress," the treaty of cession usually leaves the government and disposition of the territory to the Government of the United States; (4) that this was recognized in the treaty with Spain, which, besides declaring that "the civil rights and political status of the native inhabitants" of the ceded territory should be determined by Congress, also contained (Arts. IV. and XIII.) provisions as to duties which could not be carried out if the United States customs regulations were Constitutionally applicable; (5) that, in the absence of Congressional legislation, the regulation of the revenue of the conquered territory, even after the treaty of cession, remains with the executive and military authority; (6) that,

<sup>a</sup> Mr. Justice White, in the course of his opinion, cited *Neely v. Henkel*, 180 U. S. 109, as showing that Cuba was not incorporated into the United States, but remained a foreign country, in spite of the fact, as he declared, that, in virtue of the American occupation under the treaty of peace, the sovereignty of the United States extended over and dominated the island till the legislative department of the Government of the United States should determine that the occupation should cease.

<sup>b</sup> *American Ins. Co. v. Canter*, 1 Pet. 511, 542.

"so long as Congress has not incorporated the territory into the United States," it does not become domestic territory in the sense of the revenue laws, but the provisions of those laws concerning "foreign countries" remain applicable to it, as was unanimously declared in *Fleming v. Page*, 9 How. 603, 617; (7) that, "if Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government, which is not subject to all the restrictions of the Constitution;" (8) that such was the effect of the act of April 12, 1900, and that "the system of duties, temporarily established by that act during the transition period, was within the authority of Congress under the Constitution of the United States."

Chief Justice Fuller, with whom concurred Justices Harlan, Brewer, and Peckham, dissenting, maintained (1) that the uniformity of taxation required by the Constitution was a "geographical uniformity, and is only attained when the tax operates with the same force and effect in every place where the subject of it is found;"<sup>a</sup> (2) that the territories as well as the District of Columbia are part of the United States for the purposes of national taxation;<sup>b</sup> (3) that "the imposition of duties on commerce operates to regulate commerce, and is not a matter of local legislation," and that the duties in question were levied "in the exercise of the national power to do so, and subject to the requirement of geographical uniformity;"<sup>c</sup> (4) that the Government of the United States "is a government of enumerated powers," and that the prohibitory clauses of the Constitution are effective in the territories and the District of Columbia;<sup>d</sup> (5) that in the cases in which it was decided that the Constitutional provision as to judicial tenure did not apply to the territories<sup>e</sup> it was not held that they were not part of the United States and the power of Congress over them unlimited, nor was there the least intimation to that effect; (6) that, although endowed with independent sovereignty and with power to acquire territory, the Government of the United States, deriving all its powers from the Constitution, possesses, as to internal affairs, no inherent sovereign power not derived from that instrument or inconsistent with its letter and spirit, nor can the power of Congress to lay and collect duties be curtailed by a treaty;<sup>f</sup> (7) that, although the inhabitants of annexed

<sup>a</sup> *Knowlton v. Moore*, 178 U. S. 41; *Head Money Cases*, 112 U. S. 594.

<sup>b</sup> *Loughborough v. Blake*, 5 Wheat. 317; *McCulloch v. Maryland*, 4 Wheat. 408; *License Tax Cases*, 5 Wall. 462; *Knowlton v. Moore*, 178 U. S. 41.

<sup>c</sup> *Stoutenburgh v. Hennick*, 129 U. S. 141.

<sup>d</sup> *Marbury v. Madison*, 1 Cranch, 176; *The Passenger Cases*, 7 How. 492; *Cross v. Harrison*, 16 How. 197; *Dred Scott v. Sanford*, 19 How. 393; *Yick Wo v. Hopkins*, 118 U. S. 356; *Capital Traction Co. v. Hof*, 174 U. S. 1; *Callan v. Wilson*, 127 U. S. 550; *Thompson v. Utah*, 170 U. S. 343; *Opinion of Judge Edmunds*, Cong. Rec., 56 Cong. 1 sess. 3507; *United States v. Morris*, 1 Curtis, 50.

<sup>e</sup> *American Ins. Co. v. Canter*, 1 Pet. 511; *McAllister v. United States*, 141 U. S. 174.

<sup>f</sup> 2 *Tucker on the Constitution*, §§ 354, 355, 356; *The Cherokee Tobacco*, 11 Wall. 620; *Geofroy v. Riggs*, 133 U. S. 267.

territory are impressed with the nationality of the acquiring power, they do not necessarily acquire the full status of citizens, and that the declaration that "the civil rights and political status of the native inhabitants" should be determined by Congress merely embodied an accepted principle of international law; (8) that the question was not, as stated in the opinion of Mr. Justice White, whether Porto Rico had at the time of the passage of the act in question been incorporated into and become an integral part of the United States, but whether Congress, when it had by that act created a civil government for Porto Rico, constituted its inhabitants a body politic and given it a governor and other officers and a legislative assembly and courts, with a right of appeal to the Supreme Court, could in the same act and in the exercise of the power of national taxation "impose duties on the commerce between Porto Rico and the States and other territories in contravention of the rule of uniformity qualifying the power;" (9) that as the act made Porto Rico, whatever its situation before, an organized Territory of the United States, and thus brought it within the clauses as to national taxation, the only ground on which uniformity could be denied was that the power of Congress over commerce between the States and any of the territories was not restricted by the Constitution; (10) that the logical result of this doctrine was that Congress might prohibit commerce altogether between the States and territories and prescribe one rule of taxation in one territory and a different rule in another; (11) that the assumption that Congress was not bound in the new territories or possessions to follow the rules of taxation prescribed by the Constitution was inconsistent with the admission that the fundamental guarantees of life, liberty, and property applied there; (12) that consequently so much of the Porto Rican act as authorized the imposition of the duties in question was invalid.

Mr. Justice Harlan, while concurring in the dissenting opinion of the Chief Justice, also maintained (1) that the Constitution was ordained not by the States, but by the people of the United States;<sup>a</sup> (2) that Congress has no existence and can exercise no authority outside of the Constitution, and that still less is it true that Congress can deal with new territories just as other nations have done or may do with their territories; (3) that, by the express provisions of the Constitution, the Constitution itself and laws and treaties made thereunder are the supreme law of the land, and that the "land" referred to embraced all the peoples and all the territory, whether within or without the States, over which the United States could exercise jurisdiction or authority; (4) that the prohibition of bills of attainder, of *ex post facto* laws, and of titles of nobility goes no more directly to the root of the power of

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<sup>a</sup>Martin v. Hunter, 1 Wheat. 304, 324, 326, 331; McCulloch v. Maryland, 4 Wheat. 316, 403-406; Cohens v. Virginia, 6 Wheat. 264, 413.



Congress than does the prohibition of any duty, impost, or excise that is not uniform throughout the United States; (5) that the meaning of the Constitution can not depend upon accidental circumstances or upon particular interests in our own or foreign lands; (6) that the decision in *De Lima v. Bidwell*, that Porto Rico was a domestic territory of the United States, was inconsistent with the view that it was not embraced by the words "throughout the United States;" (7) that *Neeley v. Henkle*, 180 U. S. 119, had no bearing upon the pending question, since it merely decided, in conformity with the declarations of Congress and the treaty of peace with Spain, that Cuba was a foreign country within the meaning, not of the tariff act, but of the act of June 6, 1900, 31 Stat. 656, providing for the surrender of fugitives from justice; (8) that if Porto Rico did not, by virtue of the treaty of cession and the appropriation of money to carry it into effect, become a part of the United States, it was "incorporated" by the act in question, which provided a civil government complete in its legislative, executive, and judicial departments.

*Downes v. Bidwell* (May 27, 1901), 182 U. S. 244.

### III.

An action was brought to recover back duties paid under protest at

*Dooley v. United States.*

San Juan, Porto Rico, on several consignments of merchandise imported into Porto Rico from New York between July 26, 1898, and May 1, 1900: (1)

From July 26, 1898, to August 19, 1898, under an order of General Miles continuing the former Spanish duties; (2) from August 19, 1898, to February 1, 1899, under a tariff for Porto Rico proclaimed by the President of the United States; and (3) from February 1, 1899, to May 1, 1900, under an amended tariff promulgated January 20, 1899, by the President. The duties were therefore collected partly before and partly after the ratification of the treaty of peace, but in every instance prior to the taking effect of the Foraker Act, May 1, 1900.

Mr. Justice Brown, delivering the opinion of the court, held (1) that the duties exacted prior to the ratification of the treaty of peace were lawfully collected,<sup>a</sup> the right to exact them arising from the fact that New York, up to that time, remained a foreign country with respect to Porto Rico;<sup>b</sup> (2) that as, by the ratification of the treaty, Porto Rico ceased to be a foreign country, and the right to collect duties at New York under the general tariff laws on imports from the island ceased, so the correlative right to exact duties in Porto Rico on

<sup>a</sup>*Haver v. Yaker*, 9 Wall. 32; *Halleck*, International Law, II. 444; *New Orleans v. Steamship Co.*, 20 Wall. 387, 393; *Thirty Hogsheads of Sugar*, 9 Cranch, 191; *Fleming v. Page*, 9 How. 603; *American Ins. Co. v. Canter*, 1 Pet. 511; *Cross v. Harrison*, 16 How. 182.

<sup>b</sup>*Fleming v. Page*, 9 How. 603.

imports from New York also ceased, the spirit as well as the letter of the laws admitting of duties being levied only on importations from foreign countries; (3) that this change in the situation bound the military commander, who, although he necessarily retained, after the ratification of the treaty and till further action by Congress, the right to administer the government of the territory, yet was not, in his legislative capacity, "wholly above the laws of his own country;"<sup>a</sup> (4) consequently, that when, by the ratification of the treaty, the United States ceased to be a foreign country with respect to Porto Rico, the authority of the commander in chief to impose duties on goods imported from the United States ceased, and such goods were entitled to free entry "until Congress otherwise constitutionally directed."

Mr. Justice White, in a dissenting opinion concurred in by Justices Gray, Shiras, and McKenna, besides recapitulating the propositions contained in the dissenting opinion in the De Lima case, maintained (1) that when Congress lays duties on merchandise coming from "foreign countries," this means from countries which are not a part of the United States *within the meaning of the tariff laws*; (2) that, as long as Congress retains the power to lay duties on merchandise from a certain country, it must be a foreign country in that sense; (3) that as it had been decided, in *Downes v. Bidwell*, that Porto Rico, after the ratification of the treaty of cession, remained in a position where Congress could impose a duty on goods coming from that island to the United States, it followed that it remained, after such ratification, a foreign country within the meaning of the tariff laws, unless indeed it could be maintained that Congress, although forbidden to levy imposts on goods coming from one part of the United States to another,<sup>b</sup> nevertheless might, after a country had by the constitutional force of a treaty of cession ceased to be foreign within the meaning of those laws, cause it to become foreign in that sense by laying, in violation of the Constitution, an impost upon its products coming into the United States; (4) that even admitting, for the sake of the argument, that the treaty incorporated Porto Rico into the United States, the doctrine that it immediately became subject to the tariff laws was in conflict with the provisions of the Constitution conferring powers upon Congress in relation to the revenue, since it would deprive Congress of any opportunity to adjust the laws to the conditions involved in or created by the annexation either in the United States or in the territory annexed.

*Dooley v. United States* (May 27, 1901), 182 U. S. 222; *Armstrong v. United States* (May 27, 1901), 182 U. S. 243. Cited, 23 Op. At.-Gen. 630, as to Tutuila.

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<sup>a</sup>*Jecker v. Montgomery*, 13 How. 498; *The Grapeshot*, 9 Wall. 129, 133; *Mitchell v. Harmony*, 18 How. 115; *Mostyn v. Fabrigas*, Cowper, 180; *Raymond v. Thomas*, 91 U. S. 712.

<sup>b</sup>*Woodruff v. Parham*, 8 Wall. 123.

## IV.

A libel was filed to recover spoken pilotage at New York, June 25, 1900, on the American-built steamship *Ponce*, belonging to a New York corporation, and duly enrolled and licensed for the coasting trade, and then on a voyage from San Juan, Porto Rico, to New York.

The following questions were certified to the Supreme Court:

1. Were Porto Rican ports, at the date in question, foreign ports in the sense of the New York pilotage statutes?

2. Were vessels then engaged in trade between Porto Rican and United States ports engaged in the coasting trade in the sense of those statutes?

3. Were steam vessels engaged in such trade coastwise steam vessels in the sense of sec. 444 of the Revised Statutes of the United States?

The court, Mr. Justice Brown delivering the opinion, answered the second and third questions in the affirmative. An answer to the first question thus became unnecessary.

*Huus v. New York & Porto Rico S. S. Co.* (May 27, 1901), 182 U. S. 392.

## V.

Petitions were presented for a review of two decisions of the Board of General Appraisers, holding subject to duty certain merchandise, imported, in the one case from Porto Rico, and in the other from Honolulu, in the Hawaiian Islands. Mr. Justice Brown, delivering the opinion of the court, said: "As the sole question presented by the record in these cases was whether Porto Rico and the Hawaiian Islands were foreign countries within the meaning of the tariff laws, we must hold, for the reasons stated in *De Lima v. Bidwell*, just decided, that the Board of General Appraisers had no jurisdiction of the cases."

*Goetze v. United States.*

*Goetze v. United States* (May 27, 1901), 182 U. S. 221; *Crossman v. United States* (May 27, 1901), 182 U. S. 221.

## VI.

Emil J. Pepke, returning to the United States as a soldier from the Philippines, in September, 1899, brought with him fourteen diamond rings, which were afterwards seized by the customs authorities for nonpayment of duty. The rings were acquired by Pepke in the Philippines after the exchange of ratifications of the treaty of peace by which the islands were ceded to the United States. Were they subject to duty as having been imported from a foreign country?

*The diamond rings.*

Fuller, C. J., delivering the opinion of the court, held that this question must be answered in the negative on the strength of the

decision in *De Lima v. Bidwell*, the applicability of which was not affected either by the Senate resolution of February 14, 1899, or by the existence of armed native resistance to the authority of the United States.

Mr. Justice Brown delivered a concurring opinion.

Justices Gray, Shiras, White, and McKenna dissented for the reasons stated by them in their opinions in *De Lima v. Bidwell*, *Dooley v. United States*, and *Downes v. Bidwell*.

*Fourteen Diamond Rings*, *Emil J. Pepke, claimant, v. United States* (Dec. 2, 1901), 183 U. S. 176.

In a report to the Secretary of War, November 18, 1901, Mr. Magoon, law officer, Division of Insular Affairs, War Department, advised that the government of the Philippine Islands, instituted by the President of the United States, had the power to regulate commerce with the archipelago, and incidentally to impose import and export duties. In this report Mr. Magoon maintains that the treaty-making power is not authorized to establish the relations of territory acquired by conquest or of the inhabitants thereof to the United States, and that "the territory of the Philippine Islands being hostile by reason of the insurrection therein, such territory and its inhabitants are thereby brought within the governing authority of the war powers of the nation, the exercise of which said powers is regulated by the laws of war and not by constitutional provisions, legislative enactments, or treaty stipulations intended to provide for the conditions of peace." (*Magoon's Reports*, 210.)

By the act of March 8, 1902, "temporarily to provide revenue for the Philippine Islands," provision was made for the collection of duties on articles imported into the United States from the Philippines, and vice versa. See, also, the act of July 1, 1902, relating to the civil government of the islands.

## VII.

*Dooley, Smith & Co.* brought suit to recover duties paid under protest at San Juan, Porto Rico, on goods imported from New York after May 1, 1900, when the Foraker Act took effect. The validity of the act was assailed on the ground that it violated the constitutional provision (Art. I., sec. 9) that "no tax or duty shall be laid on articles exported from any State."

Mr. Justice Brown, delivering the opinion of the court, held that the word "export" in this clause referred only to goods exported to a foreign country;<sup>a</sup> that Porto Rico was no longer a foreign country;<sup>b</sup> that, while the place at which a duty was actually laid was not necessarily decisive as to its being an export tax, yet, in determining the nature of the duty, it was important to consider for whose benefit it was levied; and that the duty in question was under the Foraker Act in reality laid for the benefit of Porto Rico and was properly collected.

<sup>a</sup> *Woodruff v. Parham*, 8 Wall. 123; *Brown v. Houston*, 114 U. S. 622; *Fairbank v. United States*, 181 U. S. 283; *Muller v. Baldwin*, 1 L. R. 9 Q. B. 457.

<sup>b</sup> *De Lima v. Bidwell*; *Dooley v. United States*.

Mr. Justice White delivered a concurring opinion.

Chief Justice Fuller, with whom concurred Justices Harlan, Brewer, and Peckham, dissented.

*Dooley v. United States* (Dec. 2, 1901), 183 U. S. 151. Discussions of the questions involved in the insular cases may be found in the following publications: *The Status of our New Territories*, by Prof. C. C. Langdell, *Harvard Law Rev.* (Jan., 1899), XII. 365; *The Constitutional Questions incident to the Acquisition and Government by the United States of Island Territory*, by the Hon. Simeon E. Baldwin, *id.* 393; *The Constitution and New Territory*, by Prof. J. W. Burgess, *Political Science Quarterly* (Sept., 1900), XV. 381; *The Law and Policy of Annexation*, by Carman F. Randolph (Longmans, Green & Co., New York and London, 1901); *The Insular Cases*, by the Hon. Chas. E. Littlefield, before the Am. Bar Assoc., Aug. 22, 1901; *The Supreme Court and the Insular Cases*, by Prof. L. S. Rowe, *Annals of the Am. Academy of Polit. and Social Science*, Sept., 1901; *The Supreme Court and the Insular Cases*, by the Hon. Simeon E. Baldwin, *Yale Review*, Aug., 1901; *The Insular Cases*, by Carman F. Randolph, *Columbia Law Review* (Nov., 1901), I. 436; *The Porto Rico Tariffs of 1899-1900*, by Edward B. Whitney, *Yale Law Journal*, May, 1900; *The Insular Decisions of December, 1901*, by Edward B. Whitney, *Columbia Law Review*, Feb., 1902, p. 79; *Two Treaties of Paris and the Supreme Court*, by Sidney Webster (New York, Harpers, 1901, pp. 133); *Practical Legal Difficulties incident to the Transfer of Sovereignty*, by Frederic R. Coudert, jr., being an address delivered before the Academy of Political Science at Columbia University, May 27, 1902.

By the treaty between the United States and the Sultan of Muscat, then sovereign of Zanzibar, which was concluded Sept.

Division of territory.

21, 1833, and which was accepted, ratified, and confirmed by the Sultan of Zanzibar Oct. 20, 1879, it was provided that vessels of the United States entering any port within the Sultan's dominions should pay no more than five per cent duties on the cargo landed. Under this stipulation it was the custom to import into the island of Zanzibar all goods intended for the Sultan's East African dominions, and after paying the duty there to transship them to the various coast ports, the island being used merely as a base of distribution. Dec. 22, 1890, the German consul at Zanzibar notified the consul of the United States that from Jan. 1, 1891, the duty of five per cent would be collected by his Government on the coast now known as the German East African coast, which the Sultan had then recently sold to Germany. At that time the American house of Ropes, Emmerton & Co. held in the city of Zanzibar goods valued at \$44,746, imported for the coast in question, and on which they had paid to the Zanzibar customs the stipulated duty. No arrangement was made between the German Government and the Sultan of Zanzibar as to goods so situated. The Government of the United States took the ground that, under the circumstances, the American merchants were entitled either to have the merchandise, on which the duty had been paid, admitted free of duty into the coast, for which it was actually imported, or else to receive a drawback from the Sultan

to the amount of the duties paid; and an application was made to the German Government for relief from the exaction of the additional duty. The German Government refused to entertain the claim. The Government of the United States continued to press it, maintaining that it involved "a substantial hardship calling for that equitable treatment which the Foreign Office admits the case should receive." It was not deemed necessary, said the United States, to consider the question whether, by the payment of the duty, the goods themselves were invested with a right of free transportation into any part of what were then the Sultan's dominions. The duty was in fact paid on the goods for sale on the coast; by the entry of the goods at Zanzibar, they were in reality imported into the coast; but, the government of the coast having changed, a new entry was demanded and a second payment of duty exacted, simply because the government had changed. To the contention of the Foreign Office that notice should have been taken of the negotiations for the sale of the Sultan's dominions, it was answered that the importers could not reasonably be required to incur inconvenience and loss merely because negotiations were on foot of which they could not foresee either the result or the time of termination; that it seemed to be the more just and reasonable view that they had a right to continue to conduct their business according to methods which had all along been pursued and which had the sanction of law and treaty; and that the notice of Dec. 22, 1890, while it might be considered as an admission that they were entitled to be advised that they would be required to meet changes in the course of their business, was so short that it constituted rather a notification that they would be subjected to loss than an opportunity to avoid it.

Mr. Blaine, Sec. of State, to Mr. Phelps, Feb. 27, 1891, MS. Inst. Germany, XVIII. 417; Mr. Adee, Acting Sec. of State, to Mr. Phelps, May 20, 1891, id. 520. The German Government appears to have adhered to its position.

#### 4. ON PRIVATE LAW.

##### § 95.

"All the laws which were in force in Florida while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force until altered by the Government of the United States. Congress recognized this principle by using the words 'laws of the Territory now in force therein.' No laws could then have been in force but those enacted by the Spanish Government."

Marshall, C. J., *American Insurance Co. v. Canter*, 1 Pet. 542.

In the case of the Island of Grenada, reported under the title of *Campbell v. Hall*, 20 St. Tr. 239, 322; Cowp. 204, 208, it was declared by Lord Mansfield that "a country conquered by the British arms becomes a dominion of the King in right of his Crown, and therefore necessarily subject to the legislative power of the Parliament of Great Britain." It was also

declared that the "laws of a conquered country *continue until they are altered by the conqueror.*" The latter position was approved by Lord Ellenborough in *Picton's case*, 30 St. Tr. 944. (See *Dana's Wheaton*, note 169.) See, also, *Craw. v. Ramsey*, Vaughan 274; *Cross v. Harrison*, 16 How. 164; *Airhart v. Massieu*, 98 U. S. 491; *Magoon's Reports*, 526.

In cases of conquest, among civilized countries, having established laws of property, the rule is that laws, usages, and municipal regulations in force at the time of the conquest remain in force until changed by the new sovereign.

*United States v. Power's Heirs*, 11 Howard, 570; *United States v. Heirs of Rillieux*, 14 id. 189; *Leitensdorfer v. Webb*, 20 id. 176, affirming *Leitensdorfer v. Webb*, 1 N. M. 34.

An adjudication as to title to certain lands in Louisiana, made by a Spanish tribunal in that territory after its cession to the United States, but before actual possession had been surrendered, the territory being *de facto* in the possession of Spain and subject to Spanish laws, was held valid as the adjudication of a competent tribunal having jurisdiction of the case.

*Keene v. McDonough*, 8 Peters, 308.

By the law of nations the rights and property of the inhabitants are protected, even in the case of a conquered country, and held sacred and inviolable when it is ceded by treaty, with or without any stipulation to such effect; and the laws, whether in writing or evidenced by the usage and customs of the conquered or ceded country, continue in force till altered by the new sovereign.

*Strother v. Lucas*, 12 Peters, 410.

Spanish laws prevailing in Louisiana before its cession, and affecting titles to lands there, must be judicially noticed by the court. Their existence is not matter of fact to be tried by a jury.

*United States v. Turner*, 11 Howard, 863; S. P., *United States v. Chaves* (1895), 159 U. S. 452.

The general principle that when political jurisdiction and legislative power over a territory are transferred from one sovereign to another, the municipal laws of the territory continue in force until abrogated by the new sovereign, is applicable as to territory owned by the United States, the exclusive jurisdiction of which is ceded to them by a State in a manner not provided for by the Constitution, to so much thereof as is not used by the United States for its forts, buildings, and other needful purposes.

*Chicago and Pac. Railway Co. v. McGlinn*, 114 U. S. 542, holding that a law of Kansas, requiring railways not enclosed by lawful fences to pay damages for animals killed or wounded by their engines or cars, without regard to the question of negligence, remained in force in the Fort Leavenworth Military Reservation after the State had ceded exclusive jurisdiction over it.

Article 44 of the alien law in force in Cuba, under which the consul of the country to which an intestate alien belonged had the right to administer upon his estate, continued in force after Spain's relinquishment of sovereignty over the island.

Griggs, At.-Gen., April 26, 1900, 23 Op. 93; For. Rel. 1901, 226.

A claim having been made by an English firm by reason of the refusal of the municipal authorities of Manila to carry out an alleged contract for supplying certain fire apparatus to the city, it was stated that implied provision had been made by the military government of the Philippines for the protection of the rights of the claimants under the alleged contract "by the continuance of the established laws under which the contract was made, if at all, and by the establishment of competent courts whose decree will be enforced by the executive department."

Mr. Root, Sec. of War, to Mr. Hay, Sec. of State, Dec. 6, 1900, Magoon's Reps. 411, 412.

#### 5. ON PUBLIC OBLIGATIONS.

#### § 96.

"No principle of international law can be more clearly established than this: That the *rights* and the *obligations* of a nation in regard to other States are independent of its internal revolutions of government. It extends even to the case of conquest. The conqueror who reduces a nation to his subjection receives it subject to all its engagements and duties toward others, the fulfillment of which then becomes his own duty. However frequent the instances of departure from this principle may be in point of fact, it can not with any color of reason be contested on the ground of right."

Mr. Adams, Sec. of State, to Mr. Everett, chargé d'affaires to The Netherlands, August 10, 1818, Am. State Papers, For. Rel. V. 603.

"In the event of a state being divided into two or more independent sovereignties, the obligations which had accrued to the whole before the division are ratably binding on the different parts; for, as Story says, 'the division of an empire creates no forfeiture of previously vested rights of property.' And so, *e contrario*, where several separate states are incorporated into one sovereignty, the rights and obligations that belonged to each before the union are binding upon the new state; but, as General Halleck points out, of course the rule must be modified to suit the nature of the union formed and the character of the act of incorporation in each particular case."

Aldy's Kent (1878), 96, citing Lawrence's Wheaton (1863), 52, note 20.

"The opinion of the United States heretofore has been that as the foreign obligations of Peru, incurred in good faith before the war,



rested upon and were secured by the products of her guano deposits, Chile was under a moral obligation not to appropriate that security without recognizing the lien existing thereon. This opinion was frankly made known to Chile, and our belief was expressed that no arrangement would be made between the two countries by which the ability of Peru to meet her honest engagements toward foreigners would be impaired by the direct act of Chile. This Government went so far as to announce that it could not be a party as mediator or directly lend its sanction to any arrangement which should impair the power of Peru to pay those debts.

"This attitude was taken, not because any appreciable portion of the bonded debt is known to be held by citizens of the United States, nor because of any purpose to officiously guarantee the eventual rights of alien bondholders, but from an intimate conviction that any settlement would be fraught with embarrassment or even peril to both Chile and Peru, which by its terms did not provide for the payment of the honest debt of Peru.

"The same considerations which led this Government to refrain from taking an active initiative in compelling a peace, would lead it to refrain likewise from active opposition to an engagement already signed.

"Without knowing the text of the treaty provisions concerning the foreign debt of Peru, it is not easy to particularize an instruction to you. You will, however, abstain from any protest to the Chilean Minister at Lima against the pending ratification of the treaty by Chile. You will likewise abstain from any formulated protest to the provisional government of General Iglesias against such ratification by the coming Assembly. That Assembly is convened for the purpose, as is believed, of permitting a free expression of the will of the Peruvian nation, and it would be contrary to the declared policy of this Government to seek to influence its action in the direction of any determinate solution.

"At the same time, it would be the part of frankness not to withhold from such influential Peruvians as may converse with you on the state of their country the firm conviction that in order to render the treaty satisfactory and peace permanent, provision should be made for the payment of the honest indebtedness of Peru. If, as it is supposed, the treaty lately signed commits Chile to a partial recognition of the existing lien by a payment on account, it remains for Peru to make some equally distinct and efficacious provision for meeting the remainder."

Mr. Frelinghuysen, Sec. of State, to Mr. Phelps, min. to Peru, Dec. 29, 1883, MS. Inst. Peru, XVII. 33, 35.

See, also, Mr. Frelinghuysen, Sec. of State, to Mr. Roustan, French min., April 17, 1884, declining to take part in a joint representation of the foreign powers to Chile and Peru against the provisions of the treaty of peace,

so far as they impaired guarantees given by Peru to her foreign creditors. "The treaty," said Mr. Frelinghuysen, "was eventually concluded in terms at variance with those which the United States had amicably counselled, and is now ratified by both Chile and Peru. I am not now called upon to express an opinion as to whether, in the relations of governments, a security for a debt is to be followed in *rem* through all its vicissitudes of ownership." (MS. Notes to French Leg. IX. 597.)

In For. Rel. 1888, I. 182-186, there is a correspondence between the British minister in Chile and the Chilean minister of foreign relations touching the claims of Peruvian creditors on the revenues of the province of Tarapaca, and certain provisions of the Grace-Anibar contract for the settlement of the Peruvian debt. The Chilean Government contended that the Peruvian Government in attempting by the loan of 1872 to mortgage the guano beds of Tarapaca exceeded its legal powers, the acts under which the loan was issued not granting the necessary authority for the purpose; and that the only obligations of Chile in the premises, as successor in sovereignty of Peru in Tarapaca, were those which she voluntarily assumed by the decree of February 9, 1882, giving to the creditors of Peru 50 per cent of the net proceeds of the sale of 1,000,000 tons of guano, and by the treaty of peace of Oct. 20, 1883, which confirmed (Art. IV.) the decree of 1882, and stipulated, besides, that, after the sale of the 1,000,000 tons, Chile would continue to pay to the Peruvian creditors 50 per cent of the net proceeds of guano till the debt should be extinguished or the deposits be exhausted. (For. Rel. 1883, 731.) Moreover, the Chilean Government, in the course of the correspondence, declared that it was "the right of the victor to become unconditional owner of a part of the enemy's territory" for war purposes and future security; that the object of the Peruvian loans was the building of railroads and other national works exclusively in territory which Peru preserved; and that Chile had not intended, in conceding something to the creditors of Peru, who held the latter's "mere promise of honor," to acknowledge any "pretended hypothecate rights."

Chile, in taking possession, at the close of the war with Peru, of the guano deposits belonging to Peru, took them subject only to such liens as were binding under Peruvian law at the time of cession.

Mr. Bayard, Sec. of State, to Mr. Cowie, June 15, 1885, 156 MS. Dom. Let. 1.

"The general doctrine of international law, founded upon obvious principles of justice, is, that in case of annexation of a state or cession of territory, the substituted sovereignty assumes the debts and obligations of the absorbed state or territory—it takes the burdens with the benefits. Mr. Adams, when Secretary of State, expressed the principle thus, extending it even to the case of acquisition by conquest:

"The conqueror who reduces a nation to his subjection receives it subject to all its engagements and duties toward others, the fulfillment of which then becomes his own duty." (1 Whart. Int. Law Dig., sec. 5.)

"The subject is discussed by Mr. Hall (International Law, 4th ed., pp. 104, 105), and in Rivier (Principes du Droit des Gens, I., pp. 70-72, note, and authorities and instances cited).

"No fair exception to this rule can be perceived, unless expressly provided for by treaty stipulations or the instrument of cession, when the absorbed territory becomes an integral part of the acquiring state, and is altogether merged in it. . . .

"Where the federal idea obtains, this is not so. . . . If there is a distinct and independent civilized government, potent and capable within its territorial limits, conducted by a separate executive, not acting as the mere representative by appointment of the distant central administration, I perceive no reason to doubt that such government rather than the central authority should respond, out of its separate assets, to any valid claims upon it, whether accruing in the past, presently accruing, or to accrue in the future.

"There is nothing in the Hawaiian resolution of annexation which gives the negative to this theory. . . . In no respect, save a temporary delay in the process of adjustment, am I able to see that the situation as to Hawaii differs from that just stated, and I am hence of the opinion that the function of the State Department with relation to such foreign claims is to receive them through diplomatic channels, and transmit them to the government of Hawaii for adjustment."

Griggs, At.-Gen., Sept. 20, 1899, 22 Op. 583.

This opinion was given in reply to a letter of the Secretary of State, of Sept. 3, 1899, relating to certain claims against Hawaii, arising prior to annexation, which were afterwards presented to the Department of State as claims against the United States. The letter of the Secretary of State suggested the questions whether the claims were extinguished by the annexation, or whether they had thereby assumed the character of claims against the United States. Both these questions the Attorney-General, as has been seen, answered in the negative. The particular claims referred to were those mentioned in S. Doc. 116, 55 Cong. 3 sess. 111 et seq. See, also, Memorandum, 239 MS. Dom. Let. 109.

The Attorney-General declined to advise that they be referred to the Court of Claims.

As to the jurisdiction of the Court of Claims, see *United States v. New York*, 160 U. S. 598, 615.

Hall finds in the "personality of the state" the "key" to the answer to be given to the question of the relation of a new state to the "contract obligations," property, and privileges of the parent state. With rights acquired and obligations contracted by the old state in a "personal" capacity, the new state has nothing to do. On the other hand, says Hall, "rights possessed in respect of the lost territory, including rights under treaties relating to cessions of territory and demarcations of boundary, obligations contracted with reference to it alone, and property which is within it, and which has therefore a local character, or which, though not within it, belongs to state institutions localized there, transfer themselves to the new state person." Likewise, the new state "is not liable for the general debt of the parent state," but

"it is saddled with local obligations, such as that to regulate the channel of a river, or to levy no more than certain dues along its course; and local debts, whether they be debts contracted for local objects, or debts secured upon local revenues, are binding upon it. . . .

"When part of a state is separated from it by way of cession, the state itself is in the same position with respect to rights, obligations, and property as in the case of acquisition of independence by the separate portion. To a certain extent also the situation of the separated part is identical with that which it would possess in the case of independence. It carries over to the state which it enters the local obligations by which it would under such circumstances have been bound, and the local rights and property which it would have enjoyed. In other respects it is differently placed. In becoming incorporated with the state to which it is ceded it acquires a share in all the rights which the former has as a state person, and it is bound by the parallel obligations. . . .

"When a state ceases to exist by absorption in another state, the latter in the same way is the inheritor of all local rights, obligations, and property."

Hall, *Int. Law*, 4th ed., 96, 97, 98, 104, 105.

In a note, at page 98, Hall says: "The subject is one upon which writers on international law are generally unsatisfactory. They are incomplete, and they tend to copy one another. Grotius, for example, says that if a state is split up 'anything which may have been held in common by the parts separating from each other must either be administered in common or be ratably divided;' *De Jure Belli ac Pacis*, lib. II. c. ix. §10. Kent (*Comm. I.* 25) does little more than paraphrase this in laying down that 'if a state should be divided in respect to territory, its rights and obligations are not impaired; and if they have not been apportioned by special agreement, those rights are to be enjoyed, and those obligations fulfilled, by all the parts in common.' Phillimore quotes Grotius and Kent, and adds, 'if a nation be divided into various distinct societies, the obligations which had accrued to the whole, before the division, are, unless they have been the subject of a special agreement, ratably binding upon the different parts.' I. § cxxxvii. It is difficult to be sure whether these writers only contemplate the rare case of a state so splitting up that the original state person is represented by no one of the fractions into which it is divided, or whether they refer also to the more common case of the loss of such portion of the state territory and population by secession that the continuity of the life of the state is not broken. If the former is their meaning, their doctrine is correct so far as property and monetary obligations are concerned; if not, it would be hard to justify their language even to this extent. No doubt the debt of a state from which another separates itself ought generally to be divided between the two proportionately to their respective resources as a matter of justice to the creditors, because it is seldom that the value of their security is not affected by a diminution of the state indebted to them; but the obligation is a moral, not a legal one. . . . The true rule is recognized by Halleck (*I.* 76), who distinguishes the case of a state which is so split up as to

lose its identity from that of a state which suffers dismemberment without losing its identity. 'Such a change,' he says, 'no more affects its rights and duties, than a change in its internal organization, or in the person of its rulers. This doctrine applies to debts due to, as well as from, the state, and to its rights of property and treaty obligations, except so far as such obligations may have particular reference to the revolted or dismembered territory or province.'"

Again, in a note at page 104, Hall says: "There are one or two instances in which a conquering state has taken over a part of the general debt of the state from which it has seized territory. Thus in 1866 the debt of Denmark was divided between that country and Schleswig-Holstein . . . ; and in the same year Italy, by convention with France, took upon itself so much of the Papal debt as was proportionate to the revenues of the Papal provinces which it had appropriated. Lawrence, *Commentaires sur les Elémens &c. de Wheaton*, I. 214. . . . Fiore (§ 351 and note) and other writers confuse local with general debt, and elevate into a legal rule the admitted moral propriety of taking over, under treaty, the general debt in the proportion of the value of the territory acquired."

Rivier, while stating that the simple diminution of territory does not impair the treaty obligations of a state, maintains that obligations of "private law," and in particular the public debt, should follow *pro rata regionis* the portions detached or ceded. Obligations which rest specially on those portions follow them *a fortiori*. And if a diminished state was subject to a servitude that concerned only a part of the territory, and that the part which passed to another state, the latter would be bound though the former was freed. Thus portions of foreign territory which are added to the territory of the state, carry all their charges.

Rivier, *Principes du Droit des Gens*, I. 63-65.

#### 6. ON PUBLIC DEBTS.

#### § 97.

The effect of a change of sovereignty on public debts is discussed with discrimination and exceptional fullness in Appleton's *Des Effets des Annexions de Territoires sur les Dettes de l'État démembré ou annexé*. See, also, Huber's *Staaten Succession*, in which the effects of a change of sovereignty are comprehensively examined.

Various stipulations as to public debts may be found in European treaties relating to the transfer of territory, or to other acts involving a change of sovereignty, each case being dealt with for the most part according to the particular conditions on which it depended.

By the Congress of Vienna treaty, June 9, 1815, provision was made for the apportionment of the debts of the former Grand Duchy of Frankfort (Art. XL.), of Poland and the Duchy of Warsaw (Annex II., Arts. XXXI.-XXXVII.), and of Saxony (Annex IV., Art. IX.).

With regard to Saxony, it was provided that "debts specially hypothecated upon provinces which pass or remain, entire, under one government, shall be assumed, entire, by the government to which the provinces belong." As to debts appertaining to divided provinces, or to divided Saxony in general, there was established between the kings of Prussia and Saxony the following principle: "Debts for the payment of the principal or interest of which certain specific revenues have been set apart, are to be distinguished from other debts. The first shall follow the revenues in such a manner that each government shall be liable for the same proportion of the debt as it receives of the revenues. With regard to debts for the payment of which certain revenues have not been set apart, the objects for which they were contracted ought to be an index to the funds on which they should be a charge; that is, the revenues which should be devoted to the payment of the interest thereon, and the repayment of the capital. Prussia and Saxony will then contribute in the proportion in which they receive such revenues. If, contrary to all expectations, cases shall arise in which it shall be impossible to designate exactly the special funds which ought to be devoted to a debt, it shall be charged upon the totality of the revenues of the province, establishment, institution, or fund, for the benefit of which it may have been contracted; and it shall be a charge upon the two governments in proportion to the part of those revenues which each of them may receive."

By a treaty between France, Great Britain, and Russia, signed July 6, 1827, it was arranged that the Greeks should hold toward Turkey a tributary relation; and by a protocol of Dec. 12, 1828, the amount of the tribute was fixed at an ultimate maximum of 1,500,000 Turkish piastres. (See also protocol of March 22, 1829, Hertslet, *Map of Europe by Treaty*, I. 771, 801.) By a protocol of Feb. 3, 1830, it declared that Greece should form an independent state, to which the three powers, by another protocol of the 20th of the same month, agreed to insure pecuniary aid, by guaranteeing a loan. The conditions of this loan were fixed by the convention of May 7, 1832, by which it was provided (Art. XIII.) that, in case a pecuniary compensation should result in favor of Turkey from the negotiations which the three powers had opened at Constantinople for the definitive settlement of the limits of Greece, the amount should be defrayed from the proceeds of the loan. By the treaty of July 31, 1832, between France, Great Britain, Russia, and Turkey, for the settlement of the continental limits of Greece, the indemnity to Turkey was fixed at from 30,000,000 to 40,000,000 Turkish piastres, according to the adjustment of the final line.

By the treaty of Zurich, Nov. 10, 1859, between Austria, France, and Sardinia, Sardinia assumed three-fifths of the Monte-Lombardo-Veneto debt, and a part of the Austrian national loan of 1854; and it

was provided that a commission should be appointed to supervise the division of the debts and assets. It was also stipulated that Sardinia succeeded to "rights and obligations resulting from the contracts regularly stipulated by Austrian administration in respect of all matters of public interests specially concerning the territories ceded" (Art. VIII.); that reimbursement should be made for sums deposited as security (Art. IX.); that various railway concessions should be confirmed (Art. X.); and that pensions, civil and military, insuring to the benefit of persons who should retain their domicile in the ceded territory, should be duly kept up by the new government.

Similar provisions in regard to the apportionment of debts and the preservation of other obligations of the former government may be found in the treaty between Austria, Prussia, and Denmark of Oct. 30, 1864, by which Denmark renounced her rights over the duchies of Schleswig, Holstein, and Lauenberg. (See Articles VIII., IX., X., XI., XII., XIV., XV.-XVIII., XIX., and the convention between Austria and Prussia of Aug. 14, 1865).

By the treaty of London of 1864, by which Great Britain renounced her protectorate over the Ionian Islands and consented to their being reunited to Greece, the King of Greece assumed all engagements legally concluded by the government of the islands, as well as the payment of various pensions and indemnities.

By the treaty of Frankfort of May 10, 1871, no apportionment was made of the national debt of France. On the contrary, France, besides ceding Alsace and Lorraine, agreed to pay an indemnity of 5,000,000,000 francs, or, approximately, \$1,000,000,000. But by certain additional articles, signed the same day, the French Government agreed to use its right to redeem the concession given to the Railway of the East, the German Government agreeing to pay therefor 325,000,000 francs. By an additional convention concluded Dec. 11, 1871, Germany agreed to assume all pensions, civil, military, and ecclesiastical, due to persons who should retain their domicile in the ceded territory; to repay moneys deposited as security; and to recognize and confirm concessions for ways, canals, and mines, as well as contracts for the renting or cultivating of demesne property.

By the treaty of Berlin of July 13, 1878, Montenegro, Servia, and Roumania were declared to be independent, while Bulgaria became an autonomous and tributary principality. Stipulations were inserted as to the apportionment of the Ottoman debt, and as to the succession to Ottoman rights and obligations. No part of the Ottoman debt, however, was assumed by Russia on account of her acquisitions in Asia. It appears by the seventeenth protocol of the Berlin Congress that the Ottoman representative, on July 10, 1878, moved that Russia should assume that part of the Ottoman public debt which properly fell to the territory annexed by her. Count Schouvaloff replied that he

considered it to be admitted that, if there was a partition of debts in respect of territories which were detached by means of arrangement, gift, or exchange from the country of which they formed a part, it was not so where there was a conquest. Russia, he added, was a conqueror both in Europe and in Asia; she was not obliged to pay anything for the territories, and would not recognize any obligation for the Turkish debt. Prince Gortchakoff declared that he opposed to the Turkish demand the most categorical refusal, and that he would not conceal the astonishment with which it inspired him. The president of the Congress observed that, in view of the opposition of the Russian plenipotentiaries, he could but recognize the impossibility of giving effect to the Turkish proposition.<sup>a</sup>

The treaties between Spain and the Spanish-American republics, acknowledging the independence of the latter, contain various stipulations in regard to public debts.

**Spanish-American  
treaties.**

In the treaty with Mexico, Dec. 28, 1836, it is (Art. VII.) recited that, "whereas the Mexican Republic, by a law passed June 28, 1824, in its General Congress, has voluntarily and spontaneously recognized as its own and as national, all debts contracted upon its treasury by the Spanish Government of the mother country and by its authorities, during the time they ruled the now independent Mexican nation, until, in 1821, they entirely ceased to govern it, and that besides there does not exist in the said Republic any confiscation of property which belonged to Spanish subjects," the two governments agree to make no claims or pretensions on these points.<sup>b</sup>

Ecuador, by the treaty of Feb. 16, 1840 (Art. V.) assumed all debts contracted upon the credit of her treasury, whether by direct orders of the Spanish Government or by its authorities in Ecuador, provided that it was shown that they were contracted within the territory by that Government and its authorities while they administered it, until they entirely ceased to govern it in 1822.<sup>c</sup>

Uruguay, by the treaty of Oct. 9, 1841, (Art. XI.) assumed "the debt contracted by the Spanish authorities upon the revenues of Montevideo, as far as up to June, 1814."<sup>d</sup>

Chile, in Art. IV. of the treaty of April 25, 1844, incorporated, as part of the treaty, the law of the Republic of Nov. 17, 1835, acknowledging, "voluntarily and spontaneously, as the debt of the nation, the debts contracted by the Chilean Government during the war, those contracted by the Government and Spanish authorities in Chile, as well as those contracted by the Chilean Government before and after Sept. 18, 1810."<sup>e</sup>

<sup>a</sup> Br. & For. State Papers, LXIX. 1055.

<sup>b</sup> Br. & For. State Papers, XXIV. 864.

<sup>c</sup> Br. & For. State Papers, XXIX. 1315.

<sup>d</sup> Br. & For. State Papers, XXX. 1366.

<sup>e</sup> Br. & For. State Papers, XXXIV. 1108.



Venezuela, by the treaty of March 30, 1845 (Art. V.) recognized as a national debt the debts charged to the treasury of the Captaincy-General of Venezuela.<sup>a</sup>

The treaties of Bolivia, July 21, 1847; Costa Rica, May 10, 1850, and Nicaragua, July 25, 1850, contain (Art. V.) substantially the same stipulation, by which each republic recognized as part of its debt "all credits, of whatever class, for pensions, salaries, supplies, loans, freights, forced loans, deposits, contracts, and any other debt," contracted under direct orders of the Spanish Government or its functionaries in the territory, up to the time when the Spanish authorities evacuated the country.<sup>b</sup>

The Argentine Confederation, by the treaty of July 9, 1859, acknowledged (Art. IV.) as part of the debt of the Republic "all debts of any kind whatsoever contracted by the Spanish Government or its authorities in the old provinces of Spain, which constitute at present, or which may hereafter constitute, the territory of the Argentine Republic, evacuated by Spain, May 25, 1810."<sup>c</sup> The same provision constitutes Art. IV. of the treaty of the Argentine Republic with Spain of Sept. 21, 1863.<sup>d</sup>

Guatemala, by the treaty of May 29, 1863, recites (Art. IV.) that the Republic has by law recognized, as a debt of the nation, that part of it which comprised the debt of the ancient Captaincy-General of Guatemala.<sup>e</sup>

Substantially the same provision is found, *mutatis mutandis*, in Art. IV. of the treaty of Salvador with Spain, concluded June 24, 1865.<sup>f</sup>

Texas, during its existence as an independent republic, contracted various pecuniary obligations, and bonds were issued.

**The Texas debt.** for the payment of which the faith and revenues of the Republic were pledged by the acts of its Congress of November 18, 1836, and May 15, 1838. Provision was also made by an act of January 22, 1839, that a certain portion of the sales of the public lands should be annually reserved as a sinking fund for the payment of the debt until the whole should be paid.<sup>g</sup>

By the unratified treaty of 1844, for the annexation of Texas, "the United States assumed the payment of the debts of Texas to an amount not exceeding \$10,000,000, to be paid, with the exception of a sum falling short of \$400,000, exclusively out of the proceeds of the

<sup>a</sup> Br. & For. State Papers, XXXV. 301.

<sup>b</sup> Br. & For. State Papers, LIX. 422; XXXIX. 1331, 1340.

<sup>c</sup> Br. & For. State Papers, L. 1160.

<sup>d</sup> *Id.*, LIII. 307.

<sup>e</sup> Br. & For. State Papers, LIX. 1200.

<sup>f</sup> Br. & For. State Papers, LVIII. 1250.

<sup>g</sup> International Arbitrations, IV. 359; Gouge, *The Fiscal History of Texas*, see generally.

sales of her public lands. We could not with honor take the lands without assuming the full payment of all incumbrances upon them.”<sup>a</sup>

According to the terms subsequently agreed upon between the United States and the Republic of Texas, whereby the latter became one of the United States of America, the vacant and unappropriated lands within its limits were to be retained by the State and “applied to the payment of the debts and liabilities of the Republic of Texas; and the residue of the lands, after discharging the debts and liabilities, were to be disposed of as the State might direct, but in no event were said debts and liabilities to become a charge upon the Government of the United States.”<sup>b</sup>

Subsequently the United States, in 1850,<sup>c</sup> in consideration of a modification of the Texas boundary, of the cession to the United States of all claim to territory exterior to such boundary, and of the relinquishment by Texas of “all claim upon the United States for liability of the debts of Texas” and for compensation for the surrender of forts and other public property, agreed to pay to Texas \$10,000,000, but stipulated that five millions thereof should remain unpaid “until the creditors of the State holding bonds and other certificates of stock of Texas, for which duties on imports were specially pledged, shall first file at the Treasury of the United States releases of all claim against the United States for or on account of said bonds or certificates in such form as shall be prescribed by the Secretary of the Treasury and approved by the President of the United States.”

A difficulty arose in carrying this law into effect, owing to the facts (1) that the debts of Texas were charged generally upon her revenues, and not specifically on “imposts” *eo nomine*, and (2) that doubts arose whether under the agreement between the State and the United States any part of the debts could be paid unless the whole should be discharged.<sup>d</sup> These questions formed the subject of exhaustive reports by Mr. Corwin, Secretary of the Treasury, and later of an extended and able opinion by Attorney-General Cushing.<sup>e</sup> In the course of this opinion, which was largely devoted to the proper construction of the act of Congress, Mr. Cushing said:

“It is contended in some of the arguments before me, and assumed by the late Secretary of the Treasury, that the receivability of the bonds under this act in payment of any ‘duties by import,’ constitutes a special pledge of duties on imports within the meaning of the phrase in the act of Congress. I do not think this altogether certain; for,

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<sup>a</sup> President Tyler's 4th Annual Message, December 3, 1844, Richardson's Messages, IV. 344.

<sup>b</sup> 5 Stats. at L. 798.

<sup>c</sup> Act of Sept. 9, 1850, 9 Stats. 446.

<sup>d</sup> S. Ex. Doc. 103, 34 Cong. 1 sess. 406-407.

<sup>e</sup> 6 Op. 130, Sept. 26, 1853.

although the United States, by receiving the Republic of Texas into the Union, extinguished all the separate import duties, and collects them into the Federal Treasury, and may therefore be under obligation to see that all such debts of Texas as were made receivable for duties on imports are provided for, it would not therefore follow of necessity that all such debts have been in fact provided for by the act of Congress under consideration. . . . The claims to be released are: 1. Bonds, or certificates of stock; not all evidences of indebtedness, but bonds or certificates of stock. This excludes not only arrearages, if any due, for supplies or services, or any other liquidated debt, but also the circulating notes of the 9th June, 1837. . . . 2. The bonds and certificates of stock to be released are such for which duties on imports were specially pledged, a pledge of all revenues being, in my judgment, a pledge of revenues from customs. Therefore, the scope of the condition covers . . . all loans negotiated by the Republic of Texas. But the circulating promissory notes of the treasury, the red-backs, do not in my opinion come within the true meaning of the phrase 'loans negotiated by the Republic.' . . . The United States, in taking from Texas, by the act of 1850, a cession of a large quantity of her 'vacant and unappropriated lands,' and in paying her therefor, chose to stipulate that a portion of the purchase-money should be 'applied to the payment of the debts and liabilities of said Republic of Texas.' It by no means follows that the United States have assumed any liability thereby, or impliedly recognized the existence of any liability on their part; nor that any less readiness will be shown by the proud and wealthy State of Texas to fulfil the engagement in regard to her debts contained in the compact of her admission into the Union.

"To what extent, and when, the United States will in justice and equity be liable, if ever, to the creditors of the Republic of Texas, because of a lien held by them upon the revenue of that Republic to arise from duties on imports, and the transfer, by the act of annexation to the United States, of the sole and exclusive power to levy money by duties on customs, imports, and tonnage, is not a question which the Executive of the United States can decide. That question belongs properly to the Congress of the United States, which has not as yet assumed to pay the debts of Texas.

"That question, if there be any, of the liability of the United States in the premises, goes deeper, indeed, than the mere fact of revenue from customs expressly or specially pledged; for all the revenues of Texas, even where, as in the case of outstanding and unliquidated accounts for supplies and services, not expressly pledged, were yet impliedly engaged for the payment of all the debts of the Republic. And though the accession of Texas to the American Union relieved her of the burdens, and consequently expenses, military and civil, of

separate nationality, still it deprived her of certain revenues, which became irrevocably vested in the United States.

"A public creditor, like a private creditor, has a general right to receive payment out of the property, income, or means of his debtor. A special pledge of this or that source of revenue, of this or that direct tax, or indirect tax, when made by a government, renders such source of revenue, like a mortgage or deed of trust given by a private individual to his creditor, a specific lien, a fixed incumbrance, which the government ought not, in justice to the creditor, to abolish, lessen, or alienate, until the debt has been satisfied. But a public creditor, like a private one, even as to debts not secured by hypothecation of specific property or other express lien, ought not to deprive himself of the means of payment; as the two governments, that of Texas and of the United States, abundantly indicated, as well by the compact of annexion as by that for the change of boundaries.

"I waive, therefore, as irrelevant to the present object, all inquiry as to what Congress ought to do in the premises, in consequence of the absorption, by the United States, of the revenues from duties of imposts and tonnage, which might have accrued to the Republic of Texas if she had not consented to become one of the United States of America."

In 1854, while these questions were still pending, and while a bill was under consideration in Congress for their adjustment, an English holder of a Texas bond, issued in July, 1839, brought a claim against the United States for the payment thereof before the mixed commission organized under the convention between the United States and Great Britain of February 8, 1853, for the settlement of claims of citizens or subjects of the one country against the Government of the other. Mr. Hornby, the British commissioner, held that the claim should be allowed. On the other hand, Mr. Upham, the American commissioner, maintained that the commission had no jurisdiction of the subject. The indebtedness of Texas was, he said, "a distinct subject of agreement by the terms of the union;" the United States and Texas, as was shown by the act of 1850, the report of Mr. Corwin, the opinion of Mr. Cushing, and the pending legislation, were acting in concert to cause the debts to be paid; whether the United States should "be liable for this indebtedness," he did not feel "called upon to decide;" the tendency of the opinion of Mr. Cushing, so far as his views could be gathered, was to establish such liability in part; it was clear that Texas was not exonerated from the debt, and the United States had manifested a strong disposition to bring about its adjustment; but there was nothing to show that the subject was within the jurisdiction of the commission; it had not been brought to the notice of either Government, or made a matter of correspondence or difficulty between them, or included in any list of unsettled claims at the date of the convention; it therefore did not appear to be within the intent

of either contracting party as a matter to be acted upon by the commission.<sup>a</sup>

The umpire dismissed the claim, it being for transactions with the independent Republic of Texas prior to its admission as a State to the United States."<sup>b</sup>

By an act of Congress of Feb. 28, 1855, it was provided that, in lieu of the \$5,000,000 payable to Texas in 5 % stock under the act of 1850, the Secretary of the Treasury should pay to the creditors of the late Republic, who held "such bonds, or other evidences of debt for which the revenues of that Republic were pledged;" as were found by Mr. Corwin in the report approved by the President Sept. 13, 1851, or by Mr. Cushing in his opinion of Sept. 26, 1853, to be within the act of 1850, the sum of \$7,750,000, to be apportioned among the holders *pro rata*, the interest on such debt to be determined by the then existing laws of the State of Texas.<sup>c</sup>

"It has been reported that the existing Government has contracted a considerable debt. Full particulars should be ascertained as to this debt, the amount of the principal and interest, the circumstances under which it has been contracted, the persons from whom it has been borrowed, the validity of the engagements entered into with them, the manner in which the money so obtained has been expended, and the precise extent of the obligations which would have to be assumed in respect of this debt by the future government of Fiji if the islands should be annexed to the British Crown. It will, of course, be understood that Her Majesty's Government could not consent to make the revenues of this country liable in any way for this debt, or to charge upon them any portion of the cost of the local government, or of maintaining order within the Islands."

Earl of Kimberly, Colonial Secretary, to Commodore Goodenough, R. N., and Mr. Layard, British consul in Fiji, Aug. 15, 1873, C. 983, April, 1874, p. 6, instructing them to report upon the question of the proposed annexation of the Fiji Islands.

## "II. Liabilities.

"6. I have directed the accounts of the former Governments to be closed to the 10th of October, the date of cession; and all then outstanding revenue as it comes in to be applied to the reduction of the obligations unpaid at that date. It will, therefore, be some short time before the precise amount of the liabilities outstanding at the date of

<sup>a</sup>S. Ex. Doc. 103, 34 Cong. 1 sess. 406-409.

<sup>b</sup>Moore, *Int. Arbitrations*, IV. 3591-3594.

<sup>c</sup>10 *Stats.* 617-619. See Lawrence's *Wheaton* (1863), 54, note; Dana's *Wheaton*, §30, note 18. The following Congressional documents may be consulted in regard to the Texas debts: S. Ex. Doc. 29, 28 Cong. 2 sess.; S. Mis. 72, 32 Cong. 1 sess.; H. Mis. 17, 33 Cong. 2 sess.; S. Mis. 1, 34 Cong. 3 sess.; S. Mis. 198, 35 Cong. 1 sess.

cession can be ascertained; but Mr. Thurston has supplied me with an approximate statement of the liabilities computed to the 30th of September, 1874, a copy of which I inclose. This document, although susceptible of alteration to some small extent, is no doubt sufficiently accurate for all practical purposes, and will enable Her Majesty's Government to decide the general principles upon which they will be prepared to deal with these obligations. The account shows a total liability of 87,631 *l.*, and the various claims may be divided into four classes:

“(1) Amount due to debenture holders.

“(2) Amount due to Fiji Banking Company.

“(3) Amount due to Government officials and servants for salaries and wages.

“(4) Amount due to merchants and tradespeople for stores and supplies.

“7. I observe in the statement that two sums of 665 *l.* and 520 *l.* for the amount short paid on salaries during the *ad interim* Consular Government are put down amongst the liabilities. But I think that these sums should be struck out altogether. The salaries were reduced in March last, because it was estimated by Commodore Goodenough and Mr. Consul Layard that such a step was necessary to bring the expenditure of the Government within the receipts. The necessity for such a step has been proved by the result. Notwithstanding these reductions the revenue has been unequal to the expenditure, and the reductions, which might perhaps have been claimed if the revenue had proved sufficient to cover them, should not now be recognized amongst the liabilities of the Government.

“8. As regards the remainder of the claims, it must be borne in mind that they have all accrued since 1871, and that the lenders practically trusted for the repayment of their advances to the success of the so-called Constitutional Government. That experiment has proved a complete failure. The security upon which the money was lent has therefore become valueless, and if the cession of the country had not been accepted by Great Britain, not a fraction of these liabilities would ever have been recovered by the Government creditors. It appears to me, therefore, to be competent for Her Majesty's Government with perfect equity to decide upon the manner in which these liabilities shall be dealt with, and that any amount received by the creditors of the late Government should be looked upon by them as so much recovered of a worthless debt—so much rescued, as it were, from the wreck of a losing venture. Viewed in this light, I do not think that the British Government is in any way called upon to give the creditors of the collapsed Fijian Government the full amount of their claims. For example, the 51,400 *l.* of the 10 per cent. Government debentures, which is the first item in the list of liabilities, only

realized 40,502 £., whilst the next item on the list, 6,940 £., is interest on the nominal debt at 10 per cent. calculated to the 30th ultimo. If the attempt to establish constitutional government had proved successful, the creditors might fairly have claimed to be paid according to the letter of their bond; but the experiment having collapsed, it would be preposterous for them now to expect to be paid by Great Britain the risk premium and high rate of interest which they might fairly have claimed if they could have recovered it from the Fijian Government.

“9. I would suggest that the four classes into which I have divided the creditors of the late Fijian Government might be dealt with upon the following liberal principles: Classes 1 and 2, the debenture holders and the bank, might be repaid the amounts actually advanced in each case, with the simple interest at the rate of 5 per cent. per annum. The arrears of salaries and wages due to Class 3 might, I think, be paid in full without interest; and the commercial and trade accounts found, upon full inquiry, to be due to Class 4, might be paid less 10 or 15 per cent. abatement—the amount charged in such cases being probably based upon a liberal calculation of the risks involved in the transaction.

“10. If the accompanying statement of liabilities were adjusted upon this principle the amount of indebtedness would be reduced from 87,631£. to about 71,000£. or 72,000£.

“III. Fiji Bank Charter.

“11. A copy of this document will be found attached to the report of Commodore Goodenough and Consul Layard already laid before Parliament. The Charter was granted on the 13th of August, 1873, by the King and his Ministers, the Constitution of 1871 being declared in the deed to have been at that time abrogated. The validity of the instrument may therefore, I think, fairly be questioned. It contains also some provisions which are inadmissible in a British Colony, such as a monopoly of banking for fourteen years, and exemption from taxation for a similar period.

“12. I venture to recommend, therefore, that this Charter should not be recognized by Her Majesty's Government. The Company might, however, be allowed to retain so much of the 10,000 acres promised to them as they have actually been placed in possession of, and a charter might be given to them such as is usually granted to Banking Companies in Crown Colonies on their complying with the ordinary conditions.”

Sir Hercules Robinson, Governor, to Earl of Carnarvon, Colonial Secretary,  
Oct. 10, 1874, C. 1114, Feb. 6, 1875, 48-50.

“II. Liabilities.

“5. In the next place, with respect to the liabilities incurred by the persons who administered the so-called Government of Fiji before the

cession, I concur very generally with Sir H. Robinson's view of the relation in which the new Colonial Government stands toward those who had dealings with Thakombau's Governments, and the course which should be taken in respect of their claims.

"6. You will cause it to be very clearly understood that Her Majesty's Government and the Colonial Government absolutely and entirely decline to admit that they are necessarily under any obligation to take up the liabilities incurred by those who have purported to administer the affairs of the Islands. No claim of the kind preferred by way of demand or as of right can for a moment be entertained, and to prevent any possible misconception of such a question it may be desirable to relieve the Government from any attempts to press such claims by passing an Ordinance declaring that no action shall lie against the Crown or the Colonial Government in respect of liabilities incurred by the late King or by any persons not in the employment of the Crown or the Colonial Government.

"7. But although I think it necessary to define in the strongest manner the refusal of Her Majesty's Government to accept, or allow the Colonial Government to accept, any direct liability or obligation connected with the acts of persons for whom it has been in no way responsible, I am nevertheless of opinion that it will be for the credit of the newly constituted Government that voluntarily, and as an act of grace, it should offer to undertake the payment of so much of the debts incurred before the cession as after proper inquiry it may appear just and fair for it to assume. As Sir H. Robinson has pointed out, it will be necessary for this purpose to examine carefully all claims put forward, and as at present advised, I am of opinion that the four classes of the creditors of the so-called Fijian Government may be dealt with on the general principles laid down in paragraph 9 of his despatch of 20th October. But with regard to the time and manner in which any such payments are to be made, the Government of Fiji must reserve to itself the fullest discretion.

"8. I am disposed to think that the best course will be for you to notify publicly, as soon as convenient after your assumption of the Government, that while the Government of Fiji declines to be responsible for any debts or liabilities incurred by or in the name of Thakombau or any other persons purporting to represent any Government of Fiji prior to the cession, it is nevertheless willing to consider any proofs that may be brought forward of money or supplies having been actually provided for public purposes; but the persons so applying to be reimbursed must be made clearly to understand that it will rest entirely with the Colonial Government (subject, if necessary, to a reference to the Secretary of State) to decide in each case whether the sum claimed, or a part of it, should be paid, and if so, at what time and in what manner the payment shall be made."

Earl of Carnarvon, Colonial Secretary, to Sir A. H. Gordon, governor of Fiji,  
March 4, 1875, C. 1337, Aug. 6, 1875, 7-8.



“III. and IV. Fiji Bank and Polynesian Land Company.

“11. I see no reason to differ from the general conclusions arrived at by Sir H. Robinson as to these two Charters. Not only are they necessarily rendered void by effacement of the so-called Government which purported to grant them, but they are in some obvious respects contrary to those principles of policy which must prevail in a British Colony. If after inquiry you see no objection to dealing with these Companies in the manner proposed by Sir H. Robinson, you have my sanction for taking that course.”

Earl of Carnarvon, Colonial Secretary, to Sir A. H. Gordon, governor of Fiji,  
March 4, 1875, C. 1337, Aug. 6, 1875, 8.

By the joint resolution of July 7, 1898, to provide for the annexation of the Hawaiian Islands, “the public debt of the Republic of Hawaii, lawfully existing at the date of the passage” of the resolution, “including the amounts due to depositors in the Hawaiian Postal Savings Bank,” was “assumed by the Government of the United States” to an amount not to exceed \$4,000,000; but, as it was declared that, until legislation should be enacted extending the United States customs laws and regulations to the islands, their existing customs relations with the United States and other countries should remain unchanged, it was provided that, so long as those relations should continue, the Hawaiian Government should pay the interest on the debt.

By the protocol of armistice between the United States and Spain, signed at Washington August 12, 1898, it was provided:

*The Cuban debt.*

“Article I. Spain will relinquish all claim of sovereignty over and title to Cuba.

“Article II. Spain will cede to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and also an island in the Ladrões to be selected by the United States.”

In the peace negotiations at Paris, the American commissioners, Oct. 3, 1898, proposed the insertion in the definitive treaty of the following clauses:

“The Government of Spain hereby relinquishes all claim of sovereignty over and title to Cuba.”

“The Government of Spain hereby cedes to the United States the Island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and also the Island of Guam, in the Ladrões.”

The Spanish commissioners submitted, Oct. 7, 1898, a counter proposal, by which Spain was to relinquish her sovereignty over Cuba and transfer it to the United States, and by which the “relinquishment and transfer” were declared to embrace “all the prerogatives, powers, and rights” of Spain over the island and its inhabitants, and

"all charges and obligations of every kind in existence at the time of the ratification of this treaty of peace, which the Crown of Spain and her authorities in the island of Cuba may have contracted lawfully in the exercise of the sovereignty hereby relinquished and transferred, and which as such constitute an integral part thereof." For the purpose of ascertaining what were such "charges and obligations," it was proposed to be laid down that they "must have been levied and imposed in constitutional form and in the exercise of its legitimate powers by the Crown of Spain, as the sovereign of the Island of Cuba, or by its lawful authorities in the exercise of their respective powers prior to the ratification of this treaty," and that they must have been created "for the service of the Island of Cuba, or chargeable to its own individual treasury." It was, however, to be expressly declared that they should, within these limitations, include "all debts, of whatsoever kind, lawful charges, the salaries or allowances of all employees, civil and ecclesiastical, who shall continue to render services in the Island of Cuba, and all pensions in the civil and military services, and of widows and orphans."

And it was proposed that similar stipulations should be inserted with regard to Porto Rico.

The American commissioners, Oct. 11, 1898, rejected these proposals, on the ground that they appeared to convey not a proposition to "relinquish all claim of sovereignty over and title to Cuba," but in substance a proposition to "transfer" to the United States and in turn to Cuba "a mass of Spanish obligations and charges." "It is difficult," added the American commissioners, "to perceive by what logic an indebtedness contracted for any purpose can be deemed part of the sovereignty of Spain over the island of Cuba. In the article proposed it is attempted to yoke with the transfer of sovereignty an obligation to assume an indebtedness arising out of the relations of Spain to Cuba. The unconditional relinquishment of sovereignty by Spain stipulated for in the protocol is to be changed into an engagement by the United States to accept the sovereignty burdened with a large mass of outstanding indebtedness. It is proper to say that if during the negotiations resulting in the conclusion of the protocol Spain had proposed to add to it stipulations in regard to Cuba such as those now put forward, the proposal, unless abandoned, would have terminated the negotiations. The American commissioners, therefore, speaking for their Government, must decline to accept the burden which it is now proposed shall be gratuitously assumed." (S. Doc. 62, 55 Cong. 3 sess., part 2, pp. 22, 28, 33-34, 44-45.)

"II. The cession and relinquishment of sovereignty embraces the cession and relinquishment of the rights and obligations constituting it.

Spanish argument.

"The idea of the sovereignty of a state was never confounded in the ancient world, and much less in the modern and

Christian world, with the idea of individual or private ownership. Much less still with the authority of the master over the slave.

“The sovereign, it is true, has prerogatives and rights over the territory and its inhabitants; but these prerogatives and rights attach to him not for his own satisfaction and enjoyment, but for the good government and the welfare of the people subject to his rule. For this reason the rights of the sovereign become obligations with respect to his subjects. The sovereign is bound to see that they have good government, and to their progress and prosperity. The sovereign is not the owner of the tax proceeds or of the revenues he receives from his subjects, to be used for his own personal benefit, but to meet with them all public necessities and attend to the public welfare. The fulfillment of these obligations is the foundation of the legitimacy of his authority to enter into conventions and agreements of all kinds with third parties, to contract all the obligations necessary to raise means for the good administration of the government of his subjects, and to attend to the public service in the best possible manner.

“These obligations exist from the moment they are contracted until they are fulfilled. And it is perfectly self-evident that if, during the period intervening between the assumption by a sovereign of an obligation and the fulfillment of the same, he shall cease to be bound thereby through relinquishment or any other lawful conveyance, the outstanding obligation passes as an integral part of the sovereignty itself to him who succeeds him. It would be contrary to the most elementary notions of justice and inconsistent with the dictates of the universal conscience of mankind for a sovereign to lose all his rights over a territory and the inhabitants thereof, and despite this to continue bound by the obligations he had contracted exclusively for their régime and government.

“These maxims seem to be observed by all cultured nations that are unwilling to trample upon the eternal principles of justice, including those in which such cessions were made by force of arms and as a reward for victories through treaties relating to territorial cessions. Rare is the treaty in which, together with the territory ceded to the new sovereign, there is not conveyed a proportional part of the general obligations of the ceding state, which in the majority of cases have been in the form of a public debt.

“But the case to which the convention to be framed by this conference refers is clearer still. It is not the purpose here to transfer, together with the sovereignty over Cuba and Porto Rico, a proportional part of the obligations and general charges of the mother country, but only the obligations and charges attaching individually to the islands ceded and transferred. When not treating of general obligations common to all the territories subject to the sovereign contracting the same, but of the special obligations of the particular territories

ceded which were contracted by its legitimate authorities, in no single case, not even in those treaties in which the victor has shown himself most merciless towards the vanquished, have the individual and separate charges and obligations of a ceded territory failed to pass therewith. Thus it may be considered as an absolutely essential condition that the cession of territory carries with it the cession of the departmental, communal, and, generally speaking, individual obligations and debts of the ceded territory. The Great Conqueror of this century never dared to violate this rule of eternal justice in any of the treaties he concluded with those sovereigns whose territories he appropriated in whole or in part, as a reward for his victories.

“Very well; it must be recorded that the sovereignty of Spain never ceased to administer its colonies in America, from the time of the discovery, separate from the mother country. Spanish America was always governed from the capital of the monarchy by a special council called ‘Council of the Indies,’ which in no wise interfered in the régime and government of the Peninsula, which was under a council designated as the ‘Council of Castile.’

“The territory discovered by Columbus and other illustrious Spanish explorers who have rendered such great though not always appreciated services to civilization being divided into vice-royalties and captaincies-general, each of these small states collected its own revenues and met its own expenses, or contracted obligations to meet the necessities of its own separate government; and when one of these territories found itself with a permanent deficit, as was the case in the island of Cuba, the nearest sister-colony came to its rescue. The vice-royalty of Mexico from 1766 to 1806 annually assisted the island of Cuba with heavy sums for its governmental needs and the development of its natural resources, at the time unexploited, which expenses it could not, at such time, meet from its own revenues. Not less than 108 millions of pesos came into Cuba from Mexico during that period, this assistance being known in the Spanish colonial administration under the name of ‘*Situado de México*.’

“During the present century Spain carried to the last extreme this system of the separate and independent administration of its colonies. The ministry of the colonies was the department where this administration was centered. Each colony had annually its own budget and deficits. When its own revenues were not sufficient to cover its own expenses, these were met by special operations in the way of consolidated, mortgage, or floating debts, and were chargeable to the colony for whose benefit such operations were conducted.

“And the separation of the administration of the Peninsula and the colonies was for a long time so complete that the body of public employees in the executive and judicial services of the colonies was separate and independent, to the extent that these employees had not

the legal capacity to be included in the similar hierarchical bodies of Spain, or to discharge therein like functions.

"This régime is the one under which Spain has been administering Cuba up to the present time.

"We are well aware that outside of Spain grave errors are fallen into, owing to the Spanish colonial system being unknown; but it is high time, and above all at this juncture is it necessary, that these errors be dissipated by comparing them with the actual facts and the provisions of Spanish laws. Cuba and Porto Rico have never been included in the general budget of the Spanish nation, nor have their revenues ever figured therein, which is also true of their expenditures. All outstanding obligations that have been legally contracted for the service of Cuba and Porto Rico, and which are chargeable to their individual treasuries, always distinct and separate from the treasury of the Peninsula, are Cuban or Porto Rican obligations, that is, local obligations, solely and exclusively affecting the territory of the islands and their inhabitants.

"What has been said up to this point regarding the nature of the colonial obligations and those bound thereby, has never been disregarded (to their honor be it said) by the Spanish-American peoples. They achieved their independence through their own efforts, and the majority of them, before Spain had recognized it, had by prior and solemn act of their legislatures, declared as their own and as having preference those debts which the Crown of Spain had contracted during the continuance of its sovereignty for the service of such territories, and which debts were recorded in their respective treasury books.

"Very few of the Spanish-American Republics delayed so honorable a declaration until the mother country had recognized their independence, as was said by the Argentine Republic in the treaty concluded with Spain on September 21, 1863, and by Uruguay, in that concluded on July 19, 1870: 'Just as they acquired the rights and privileges belonging to the Crown of Spain, they also assume all its duties and obligations.'

"Note that the Spanish-American Republics without exception recognized and assumed as their own these debts *of every kind whatsoever*, specifying them in the treaty of peace with Bolivia of July 21, 1847, wherein it is stated that they 'include all debts for pensions, salaries, supplies, advances, transportation, forced loans, deposits, contracts, and any other debt incurred during war times or prior thereto, chargeable to said treasuries; provided they were contracted by direct orders of the Spanish Government or its constituted authorities in said territories.'

"Spain did not recognize the independence of any American state which had previously been her colony save upon this condition, which

those states spontaneously incorporated in their respective treaties, as of right they should.

"Her right and her dignity will not permit her to recognize—without this condition, which now more than ever if possible is still just and proper—the independence of the Cuban and Porto Rican peoples, which they have not been able to achieve by their own unaided efforts.

"Spain is disposed to cede the sovereignty over Porto Rico and other islands of the West Indies, and to relinquish the sovereignty over the island of Cuba, all in favor of the United States, which shall accept the same; she placing this sovereignty at their disposal in the condition in which she now holds it, and therefore with the rights and charges at present constituting it. She bound herself to this by Articles I. and II. of the protocol signed at Washington on August 12 last, and this is what she desires to carry out with the strictest faith in the present treaty."

Memorandum of Spanish Peace Commission, Paris, Oct. 11, 1898, S. Doc. 62, 55 Cong. 3 sess., part 2, pp. 41-44.

"The second part of the Spanish memorandum is devoted to an argument to maintain the proposition that 'the cession and American reply. relinquishment of sovereignty embraces the cession and relinquishment of the rights and obligations constituting it.'

"The American Commissioners are not disposed to comment upon the indefiniteness of this proposition, or upon the fallacies involved in treating the obligations which a sovereign may incur in the exercise of his sovereignty as a part of the sovereignty itself. National sovereignty (*soberanía nacional*), as defined by high Spanish authority (*Novísimo Diccionario enciclopédico de la lengua castellana*, por D. Delfín Donadín y Buignau, based on the Dictionary of the Spanish Academy), is 'the right which a nation has of organizing the public powers in such a way as it may deem advisable.' This right, though it includes the power to contract obligations, is in no sense composed of them. The thing done in the exercise of sovereignty is not a part of the sovereignty itself; the power to create is not the thing created. Nor is it possible to shut our eyes to the fact that in the Spanish memorandum the term obligations is used indiscriminately in respect of two different things, namely, the duties which a sovereign as such owes to his subjects, and the debts which he may specially contract in the exercise of his sovereign power for his own purposes.

"With these preliminary observations, the American Commissioners proceed to the consideration of the specific matter before them.

"The American Commissioners note the declaration in the Spanish memorandum that there is no purpose now to transfer with the sovereignty of Cuba and Porto Rico a proportional part of the national debt of Spain, but 'only the obligations and charges attaching individually to

the islands,' which obligations and charges it likens to the local debts which pass with ceded territory. It appears, however, by the explanation given in the memorandum of the origin of these charges and obligations, and of the manner in which they were contracted, that they include the whole of what is commonly called the Cuban debt. The American Commissioners, therefore, while reaffirming their position as to the exclusion by the protocol of any proposal for the assumption of such charges and obligations, will examine the subject in some of its aspects.

"It is true that the financial department of the Island of Cuba, commonly called the 'Cuban Treasury,' was not a branch of the Spanish Treasury, but it is equally true that it was accountable to the Spanish Secretary for the Colonies, the *Ministro de Ultramar*, and that it was managed by a body of officials appointed by the Crown, at whose head was a high functionary called *Intendente General de Hacienda*. In each year a budget was made up by the Spanish Colonial Secretary on data furnished by the *Intendente General*, and this budget was submitted to and acted upon by the Cortes. If in any year the revenues collected in Cuba were insufficient to meet the burdens imposed upon them, the deficit was charged to the island, and formed a new item of the Cuban debt. It thus appears that the finances of the island were exclusively controlled by the Spanish Government, and that the debt was in no sense created by Cuba as a province or department of Spain, or by the people of the island. In reality it is notorious that the denial to Cuba of any financial autonomy and of any power to protect herself against the imposition by Spanish officials of enormous burdens for purposes foreign and adverse to her interests, has been the most prolific source of discontent in the island. The debt-creating power, such as commonly belongs to communes or municipal corporations, never was delegated to Cuba. Such a thing as a Cuban obligation, created by the island in the exercise of powers either inherent or delegated, is unknown to the markets of the world.

"Having briefly sketched the system of financial administration with respect to Cuba, we may consider the origin of the debt.

"Prior to 1861 no so-called Cuban debt existed.

"The revenues of the island were as a rule far more than sufficient to pay the expenses of its government, and produced in each year a surplus. This surplus was not expended for the benefit of the island, but was sent to Madrid. The surpluses thus disposed of amounted, from 1856 to 1861 inclusive, to upward of \$20,000,000.

"In 1864, in order to meet the national expenses of the attempt to 'reincorporate' San Domingo into the Spanish dominions, and of the 'expedition to Mexico,' the Spanish authorities issued bonds to the amount of \$3,000,000. Subsequently new loans were made, so that the so-called Cuban debt had swollen by 1868 to \$18,000,000.

"In that year the ten years' war for Cuban independence broke out, a war produced by causes so generally conceded to be just as to need no exposition on this occasion. All the expenses of this war were imposed upon Cuba, so that in 1880, according to a statement made at Madrid in that year by a Spanish Secretary for the Colonies, the so-called Cuban debt amounted to upward of \$170,000,000.

"Subsequently the Spanish Government undertook to consolidate these debts, and to this end created in 1886 the so-called *Billetes hipotecarios de la Isla de Cuba*, to the amount of 620,000,000 pesetas, or \$124,000,000. The Spanish Government undertook to pay these bonds and the interest thereon out of the revenues of Cuba, but the national character of the debt was shown by the fact that, upon the face of the bonds, 'the Spanish nation' (*la Nación española*) guaranteed their payment. The annual charge for interest and sinking fund on account of this debt amounted to the sum of 39,191,000 pesetas, or \$7,838,200, which was disbursed through a Spanish financial institution, called the *Banco Hispano-Colonial*, which is said to have collected daily from the custom-house at Havana, through an agency there established, the sum of \$33,339.

"In 1890 a new issue of bonds was authorized by the Spanish Government, to the amount, as it is understood, of 875,000,000 pesetas, or \$175,000,000, with the same guarantee as before, apparently with a view to refund the prior debt, as well as to cover any new debts contracted between 1886 and 1890. It seems, however, that only a small number of these bonds had been disposed of when in February, 1895, the last insurrection and movement for independence broke out. The Government of Spain then proceeded to issue these new bonds for the purpose of raising funds with which to suppress the uprising, so that those outstanding on January 1, 1898, amounted, according to published reports, to 858,550,000 pesetas, or \$171,710,000. In addition to these a further loan, known as the 'Cuban War Emergency Loan,' was, as the American Commissioners are advised, floated to the amount of 800,000,000 pesetas, or \$160,000,000, represented by what are called 'five per cent peseta bonds.'

"Although it does not appear that any mention is made in these bonds of the revenues of Cuba, it is understood that they are regarded in Spain as properly constituting a part of the 'Cuban Debt,' together with various unliquidated debts, large in amount, incurred by the Spanish authorities in opposing by arms the independence of Cuba.

"From no point of view can the debts above described be considered as local debts of Cuba or as debts incurred for the benefit of Cuba. In no sense are they obligations properly chargeable to that island. They are debts created by the Government of Spain, for its own purposes and through its own agents, in whose creation Cuba had no voice.

"From the moral point of view, the proposal to impose them upon



Cuba is equally untenable. If, as is sometimes asserted, the struggles for Cuban independence have been carried on and supported by a minority of the people of the island, to impose upon the inhabitants as a whole the cost of suppressing the insurrections would be to punish the many for the deeds of the few. If, on the other hand, those struggles have, as the American Commissioners maintain, represented the hopes and aspirations of the body of the Cuban people, to crush the inhabitants by a burden created by Spain in the effort to oppose their independence would be even more unjust.

"The American Commissioners deem it unnecessary, after what has been stated, to enter into an examination of the general references, made in the Spanish memorandum, to cases in which debts contracted by a state have, upon its absorption, been assumed by the absorbing state, or to cases in which, upon the partition of territory, debts contracted by the whole have been by special arrangement apportioned. They are conceived to be inapplicable, legally and morally, to the so-called 'Cuban debt,' the burden of which, imposed upon the people of Cuba without their consent and by force of arms, was one of the principal wrongs for the termination of which the struggles for Cuban independence were undertaken.

"The American Commissioners have deemed it due to the Spanish Commissioners and to themselves to make these observations upon the general subject of Cuban 'charges and obligations,' apart from the special circumstances under which the present negotiations were begun. But, as they have heretofore stated, they consider the subject to be disposed of beyond all question by the Protocol. The suggestion that their Government should assume, either for itself or for Cuba or Porto Rico, the burden of the 'charges and obligations' now in question was not put forward during the negotiations that resulted in the conclusion of that convention, nor, if it had been so put forward, would it have been for a moment entertained by the United States.

"From unselfish motives, of which it is unnecessary to make a renewed declaration, the Government of the United States, at great sacrifice of life and treasure, has prosecuted the conflict which followed its demand for the relinquishment by Spain of sovereignty over Cuba.

"One of the results of that conflict is the unconditional agreement, embodied in the first article of the Protocol, that Spain 'will relinquish all claim of sovereignty over and title to Cuba.' Upon the simple fulfilment of that stipulation the American Commissioners are obliged to insist."

Memorandum of American Peace Commission, Paris, Oct. 14, 1898, S. Doc. 62, 55 Cong. 3 sess., part 2, pp. 48-50.

"The American Commissioners, having listened with great respect to the arguments orally urged by the Spanish Commissioners in support of the articles offered by them, as well as duly considered the written

memorandum submitted in support of the same, must adhere to the rejection thereof as stated in the memorandum of the American Commissioners read to the Commission and attached to the protocol of the 11th instant. The chief additional reason adduced in the oral presentation for the acceptance of sovereignty by the United States in Cuba is that without such acceptance the people of Cuba notably of Spanish origin will have no protection of person and property. The United States recognizes in the fullest measure that in requiring the relinquishment of all claim of Spanish sovereignty and the evacuation of the Island of Cuba it has assumed all the obligations imposed by the canons of international law and flowing from its occupation. The United States, so far as it has obtained possession, has enforced obedience to law and the preservation of order by all persons. It has no disposition to leave the island a prey to anarchy or misrule.

“As the Spanish Commissioners strenuously urge that the acceptance of sovereignty includes the assumption of the so-called Cuban debt, and as it is evident that this question divides the Commission and stays its progress, the American Commissioners, having carefully considered the arguments of the Spanish Commissioners, must again and finally decline to accept this burden either for the United States or for Cuba. In the articles proposed by the American Commissioners on the third instant there were contained certain stipulations which, the American Commissioners believed, while not enlarging the Protocol, would effectually preserve the evidence of title to property and make clear the nature of public property and rights included in the relinquishment of sovereignty and title. It having been urged that these, no less than the articles proposed by the Spanish Commissioners, enlarge the terms of the Protocol, the American Commissioners are now prepared, for the purpose of disposing of the question of Cuba, Porto Rico, and Guam, simply to embody in the treaty the precise stipulations of the Protocol on those subjects, neither adding thereto nor subtracting therefrom.

“The American Commissioners, therefore, offer as a substitute for the articles heretofore presented by them, the following:

“Article I. Spain hereby relinquishes all claim of sovereignty over and title to Cuba.

“Article II. Spain hereby cedes to the United States the Island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and also the Island of Guam in the Ladrões.”

Memorandum of American Peace Commission Paris, Oct. 17, 1898, S. Doc. 62, 55 Cong. 3 sess., part 2, pp. 52-53.

“The American Commissioners also reject the other articles of the draft submitted by the Spaniards.

**Spanish rejoinder.**

“They do not admit that the charges and obligations of the sovereign which proceed exclusively from the public service of the colony are part of the sovereignty. The Spanish Commission, without

entering upon a purely technical discussion of the question as to whether such obligations form part of the sovereignty or are merely an effect of the exercise of the sovereignty itself, for the result of such a discussion would be absolutely without effect upon the point on which the Commissioners on both parts do not agree, will simply proceed briefly to set right the facts and the opinions which are set forth in the American memorandum of the 14th instant. In order to demonstrate that the colonial obligations of Spain in Cuba must not remain a charge upon that island, the American Commissioners state that these obligations were contracted by the Crown through the medium of its officials in the colony, but without any intervention or consent towards such obligations on the part of the colony.

"It is true, the colonial system then prevailing in Spain did not confer upon its colonies the right of having elected Chambers which would administer the supreme powers in conjunction with the sovereign. In the last twenty years, however, it was not thus. The Antilles had representatives in both Chambers who surely intervened in all the legislative acts bearing upon colonial obligations without ever protesting against their lawfulness or binding force. Moreover, besides this, it can not be denied that so long as this system prevailed, maintaining all the characteristics of legality established at the time, the acts which the colonial sovereignty performed within the powers with which it was invested by law, were perfectly lawful, and carried, as they could not fail to do, all their rightful consequences. It is a fundamental maxim of public law, without which the credit of a state could not exist, because the validity of all its acts would always be at the mercy of any triumphant revolutionary movement whatsoever. The wisdom of the acts of the sovereign may be discussed, but when they have been executed by virtue of his attributes and in the solemn form recognized and established by law, their lawfulness and binding character are not a matter for discussion.

"This principle was recognized by the First Consul when he concluded his first treaty of August 24, 1801, with Bavaria. In its fifth article he agreed to apply the provision of the Luneville treaty of peace with regard to the mortgage debts of the country on the left bank of the Rhine. In those territories there were Diets which participated in the power of the sovereign, and for this reason the said treaty of Luneville demanded that such debts should have been agreed to by them. But in the Duchy of Deux-Ponts and in that part of the Palatinate of the Rhine which France acquired by the treaty with Bavaria there was no such governmental institution, and therefore the First Consul agreed in the treaty of 1801 that the debts should follow the countries, provided they had been registered at their origin by the supreme administrative authority.

"If the position opposed to this doctrine were maintained, the Russian people might be exempted from meeting all the obligations that

may have been or may be contracted by its Emperors while this system should obtain, for the administration and government of their Empire, in the event of the abolition of the autocratic system now prevailing in Russia. The United States themselves, who as a matter of fact continued to observe after their emancipation many of the provisions of law enacted previously without their intervention by the power of the mother country, would have to return to Russia Alaska, which the Emperor sold to them in 1867 without the intervention in such sale of the inhabitants of the country thus sold; likewise they should return to Spain Florida, for the same reason, etc.

“If in order that a debt be lawful it be necessary that the people which has to pay the same should intervene when it is incurred, when the law does not confer such intervention, how much more necessary must the intervention of a people be when its sovereign sells the territory which it inhabits.

“The very act of cession of sovereignty over the Antilles would be tainted with nullity, since the Cuban and Porto Rican peoples have not been consulted and have not expressed their formal assent to the Protocol of Washington. Such are the consequences of a theory which in the heat of the discussion has been advanced in the memorandum of the American Commissioners.

“The very point which most limits the freedom of action of sovereigns in the conclusion of their treaties is that relative to the debts of their states. As to the integrity of their territory and even as to their own honor they may bind themselves freely and validly because they dispose of what is their own. But this liberty is curtailed when their acts immediately reflect on the lawful rights of those private parties who lawfully acquired said rights under the protection of the laws and have thereafter had no part whatsoever in the conflicts which are solved by treaties, and should consequently not suffer unduly from the consequences of such treaties to the prejudice of their private and legitimate interests.

“When the creditors of a state make a contract with the same, they always take into earnest account the conditions of solvency of the state to which they lend their property. Hence, when these conditions of solvency are impaired in consequence of territorial cessions, the High Contracting Parties between whom these cessions are effected, that which makes the cession as well as that which acquires the ceded territory, always endeavor wholly to respect such rights by means of a partition of the obligation between the territory kept by the ceding sovereign and the territory acquired by the sovereign to whom it is ceded. This is what has been done in the treaties of territorial cession.

“But when the creditors have been granted by the very certificate of their contract a direct lien on certain defined property or certain defined income, in order thus to recover the loaned capital and its legitimate

interest, the sovereign cannot then, without first reckoning with their consent, cede or freely dispose of such property and incomes as if they were his full and exclusive property.

“If a sovereign should consent thus to trample upon rights which are not his own, those to whom such rights appertain would not be bound to submit and remain without appeal, in the name of the sacred principles which protect private property, to the respect of what belongs to him, whoever he may be who has in his power that which lawfully belongs to him.

“And it were well in this connection formally to record that even granting that the principle sustained by the Spanish and contested by the American Commission, to wit, that the colonial debt should not be chargeable to the mother country, is inadmissible, this could never mean that Spain should now assume, with respect to the holders of that debt, more obligations than she contracted upon creating it. And, therefore, with respect to that part of the debt where she contracted only a subsidiary obligation to pay (since at issue it was expressly secured by certain and determinate revenues and receipts), Spain will have the right, under the law, to consider that she is not bound to pay such debt save in the event of the revenues and receipts primarily hypothecated to the payment thereof proving insufficient, for not until then, according to the elementary rules of law, will the subsidiary obligation she contracted be enforceable.

“Without expatiating to-day on the information, very incorrect, which is set forth in the American memorandum concerning the Cuban debt, the Spanish Commission would confine itself to asserting that as a general rule the Island of Cuba has not since its discovery covered its own expenses.

“As long as Spain kept the American colonies the island was sustained by the pecuniary aid of her sisters and especially by that of the Vice-Royalty of Mexico. In this century, for a very few years, she had a surplus, thanks to the development of her natural resources, at last obtained through this assistance, and it is true that this surplus was turned over to the treasury of the Peninsula. But with this exception it is patent that the general accounts of the Spanish State from 1896-97 show that the treasury of the Peninsula advanced to Cuba, in the years preceding that recent period, a sum amounting to 429,602,013.08 pesetas. There also appears an advance to Porto Rico of 3,220,488.67 pesetas, and to Santo Domingo 1,397,161.69 pesetas.

“The prosperity of Cuba was of short duration, for the greater part of the time from the days of Columbus, by reason either of the scarcity of its inhabitants or of the slavery of the black race which formed the majority, or lastly because Spaniards preferred to colonize other parts of America, the island was unable to develop its natural resources; and it was nevertheless constantly necessary to expend in the island

the large sums which were required for the establishment of reform and the creation of the institutions which are the essential conditions of modern life.

"The Spanish Commission can not but protest against the assertion made in the American memorandum that the ten years' insurrection was the outcome of just grievances, and it regrets that such an assertion should have been made without a necessity which would have required it unavoidably, in the same way as the American Commission would surely, and with good reason, regret that the Spanish Commission should say anything here without an imperative necessity of the justice of the rebellions of the natives of the immense American territory which the United States had so often to suppress with an iron hand, and if it should also say anything of the right by which the Southern States attempted to break the federal bond by the force of arms.

"It is useless, for reasons that will hereafter be stated, for the Spanish Commissioners to take up the concrete discussion of the divisions of the Cuban debt to which reference is made in the American memorandum. They understand the errors that may have found their way into that document, because it is very natural that the American Commissioners should not have such accurate knowledge as is requisite for precise judgment of the acts of the Spanish administration in the Peninsula, or in its colonies.

"And we find a confirmation of this in the facts.

"In regard to the argument against the recognition of a certain part of the Cuban debt, on the ground that the rebellion of a minority of the Cuban people to obtain their independence was just, we have only to make the following remark:

"The insurgent minority, it is true, rose up in arms to secure the independence of the island. The United States erroneously believed that their cause was just, and by force of arms caused it to prevail against Spain. But now the facts have shown that Spain was right, as the United States themselves have had to recognize that the Cuban people are not as yet in such conditions as are necessary to entitle them to the enjoyment of full liberty and sovereignty. It is upon this ground that the United States have decided to withhold from that people the said privileges and to hold them under American control, until they become able to enjoy that liberty prematurely demanded by them.

"The Spanish Commission feels bound, furthermore, to call the attention of the American Commission to the obligations of Porto Rico.

"The American 'memorandum' which is now answered refers exclusively to the obligations of Cuba. Is this omission due to the belief

that as the sovereignty over Porto Rico was not relinquished but ceded by Spain to the United States, it must be conveyed to the latter free from burdens of all kinds? Is the principle maintained that cessions of territory, for whatever causes, whether conquest, or a mere agreement, do not carry with them *ipso facto* all the burdens which encumber the ceded territory?

"In the oral discussion the American Commissioners stated that the Spanish Government had declared that no debt rested on the smaller Antille. The Spanish Commissioners have carefully gone over all the written communications that have passed between the two High Parties, from the ultimatum of the President of the Union of April 20 of this year to the signing of the protocol in Washington on August 12 of the same. In none of them have they found a suggestion or trace of such a declaration. And, be it said in passing, that among other obligations, the smaller Antille has been burdened for very many years with a part, which though small is no less sacred, of the perpetual and truly just charge through which Spain, in the name of America rather than her own, has been showing her gratitude to the immortal Columbus, who discovered it, and his legitimate descendants, and, should the conclusions of the American Commissioners prevail and Spain continue paying it, logic would place the United States in the position of repudiating it.

"But the fact is that the discussion upon the so-called Cuban debt seems to lack opportuneness at the present.

"The American Commissioners, when referring to the principal items of the said debt, doubtless believed that the Spanish Commission had suggested in its draft the said items to be at once admitted as colonial debt to be transferred together with the sovereignty either to Cuba or to the United States; and this is the capital error upon which the American memorandum is based. The Spanish Commissioners only wish that the principle, up to this time always admitted, to wit, that a debt being exclusively the debt of a colony and affecting its territory goes with the colony itself, be also recognized in this treaty. The American memorandum says nothing in contradiction of this principle, nor do the Spanish Commissioners expect that anything be now said against it, least of all by the United States, whose territory was acquired by them not only with their blood, but also with the money of their treasury. There are publicists who maintain that the thirteen original States paid over to their mother country fifteen million pounds sterling (£15,000,000); and the facts are official that the United States paid to France, Spain, the Indian nations, and Russia respectively considerable sums of money for Louisiana, Florida, the Indian States, Texas, California, and Alaska. This instance would be the first one in the history of the United States, in which they, acting

at variance with their own traditions, should have gratuitously acquired a territory which sooner or later will be annexed to the Union.

“The case of the acquisition of Texas, identical as to its origin, its process and its end with that of the Island of Cuba, eloquently shows that the policy then pursued with Mexico by the United States is different from the one now pursued with Spain. In the case of Mexico the American armies, also in support of insurgents, the Texan insurgents, spread themselves over the territory of the whole Mexican Republic, and went as far (a fact which has not taken place in Cuba) as to capture the national capital. The United States demanded then from Mexico the independence of Texas as they now demand from Spain the independence of Cuba, and furthermore they caused Mexico to cede to them New Mexico and California, as now they cause Spain to cede to them Porto Rico and other Spanish islands in the West Indies. But in the case of Mexico they did not ask from her Government any war indemnity, and consented not only to pay her the value of the territories ceded and annexed to the American Empire, but also to assume the payment of the American claims then standing against Mexico.

“In the case of Spain, however, they have demanded from her, in the way of war indemnity, the cession of the islands above mentioned, and ask now, additionally, that the burdens which encumber those islands as well as their sister Cuba be thrown on the mother country, who with her own hands introduced them into the life of the civilized world.

“The only wish of the Spanish Commissioners is that the principle above referred to be admitted and recognized. Its practical application may, according to their understanding of the subject, be afterwards entrusted to a Commission of righteous and impartial persons. If this Commission, upon examination of the bill of items to be filed by Spain, showing what obligations ought in her opinion to be paid by either Cuba, or Porto Rico, should decide that those obligations must fall on the mother country, Spain shall submit to its decision. But if the Commission decides that the whole or a part of the said debts ought to be paid by the colony, there is no reason why the United States in their turn should not also submit to the award. If the United States feel so sure, as they seem, in their position, they can not see any danger in assenting to the proposition herein made by the Spanish Commission. But if they are not so sure, their high sense of justice and the duty of respect which they owe to themselves impose upon them the obligation of causing a matter of mere pecuniary interest to be made subordinate to the sacred cause of justice.

“And in order to show to the American Commission that the Spanish Commissioners have no other wish than the one stated, and that their



purpose is not by any means to have a fixed sum adjudged at this time, as a colonial debt to be paid by the Spanish Antilles, they have decided to withdraw Articles II., IV. and V., as drawn up by them in their former draft, and offer as a substitute for the three a single article, reading as follows:

“Article II.

“The relinquishment and transfer made by her Catholic Majesty and accepted by the United States of America embrace:

“1. All the prerogatives, powers and rights belonging to her Catholic Majesty as a part of her sovereignty over the Island of Cuba and its inhabitants.

“2. All the charges and pecuniary obligations, outstanding at the date of the ratification of this treaty, which upon careful examination of their origin, their purposes and the conditions of their creation, should be adjudged according to strict law and undeniable equity to be different from the charges and obligations which properly and specifically belong to the Peninsular treasury, owing to their having been at all times properly and specifically belonging to Cuba.

“To secure the careful examination provided for in the foregoing paragraph, a Commission consisting of competent and impartial persons shall be appointed by the two High Contracting Parties. The manner of this appointment shall be determined in this treaty by a separate article.”

Memorandum of Spanish Peace Commission, Paris, Oct. 26, 1898, S. Doc. 62, 55 Cong. 3 sess., part. 2, pp. 85-90.

“In the Spanish memorandum an effort is made to answer that part of the argument submitted by the American Commissioners on the 14th instant in which it is maintained that the so-called Cuban debt is not in any sense a debt of Cuba, but that it is in reality a part of the national debt of Spain. The American Commissioners were able to show that the debt was contracted by Spain for national purposes, which in some cases were alien and in others actually adverse to the interests of Cuba; that in reality the greater part of it was contracted for the purpose of supporting a Spanish army in Cuba; and that, while the interest on it has been collected by a Spanish bank from the revenues of Cuba, the bonds bear upon their face, even where those revenues are pledged for their payment, the guarantee of the Spanish nation. As a national debt of Spain, the American Commissioners have never questioned its validity.

“The American Commissioners, therefore, are not required to maintain, in order that they may be consistent, the position that the power of a nation to contract debts or the obligation of a nation to pay its debts depends upon the more or less popular form of its government. They would not question the validity of the national debt of Russia,

because, as the Spanish memorandum states, an autocratic system prevails in that country. Much less do the American Commissioners maintain that a nation can not cede or relinquish sovereignty over a part of its territory without the consent of the inhabitants thereof, or that it impairs the national obligation of its debt by such cession or relinquishment.

“Into these questions they do not think it necessary to enter.

“As to the rights, expectations, or calculations of creditors, to which the Spanish memorandum adverts, the American Commissioners have only to say that as regards the so-called Cuban debt, as explained in their memorandum of the 14th instant, the creditors, from the beginning, took the chances of the investment. The very pledge of the national credit, while it demonstrates on the one hand the national character of the debt, on the other hand proclaims the notorious risk that attended the debt in its origin, and has attended it ever since.

“The Spanish memorandum observes that in the last twenty years the Antilles have been represented in the Spanish Cortes and declares that their representatives have participated in all legislative acts bearing upon colonial obligations without ever protesting against their lawfulness or binding force. The information in the possession of the American Commissioners leads to a different conclusion.

“The American Commissioners have in their hands the *Diario de las Sesiones de Cortes*, for Thursday, the 29th of July, 1886, when the Cuban budget for 1886-1887 was introduced and discussed. By this record it appears that on the day named Señor Fernandez de Castro, a Senator from Cuba, referring to the budgets of 1880, 1882, 1883, 1884, and 1886, declared that he had objected to all of them, and that no Cuban debt ought to be created, since the obligations embraced in it were national and not local. He entered into a brief examination of the items which constituted the debt, and created something of a sensation by pointing out that quinine had been consumed in Cuba, during the war of 1868-1878, at the rate of \$5,000 a week.

“Another Cuban Senator, Señor Morelos, supported the views of Señor Fernandez de Castro.

“Senator Carbonell, representing the University of Havana, in a speech of great power, continued the argument, saying: ‘Have the people involved in this matter ever been consulted? The country has not been heard, and now for the first time has become acquainted with the fact that it has to pay such debts.’

“The Cuban and Porto Rican Senators, Señores Portuondo, Ortiz, Labia, Montoro, Fernandez de Castro, Figueras, and Vizcarrondo, went further, and introduced a bill to provide for the payment by Spain of the so-called Cuban debt in proportion to the productive capacity of the various provinces.

“The protests of the colonial Senators were not heeded, but their

justice was recognized by no less a Spanish statesman than Señor Sagasta, the present Premier of Spain, then in the opposition, who said:

“Our treasury is not now sufficiently provided with funds to aid Cuba in the way and to the extent that we would like to do; but I say the Peninsula must give all that it can, and we must do without hesitation all that we can.’

“Was not this a clear acknowledgment of the national character of the debt?

“Perhaps not so clear as that made in the decree of autonomy for Cuba and Porto Rico, signed by the Queen Regent of Spain on the 25th of November, 1897, and countersigned by Señor Sagasta, as President of the Council of Ministers. In Article II. of the ‘Transition Articles’ of the decree, we find the following declaration:

“ARTICLE II. The manner of meeting the expenditures occasioned by the debt which now burdens the Cuban and Spanish treasury, and that which shall have been contracted until the termination of the war, shall form the subject of a law wherein shall be determined the part payable by each of the treasuries and the special means of paying the interest thereon, and of the amortization thereof, and, if necessary, of paying the principal.

“Until the Cortes of the Kingdom shall decide this point, there shall be no change in the conditions on which the aforesaid debts have been contracted, or in the payment of the interest and amortization, or in the guarantee of said debts, or in the manner in which the payments are now made.

“When the apportionment shall have been made by the Cortes it shall be for each one of the treasuries to make payment of the part assigned to it.

“Engagements contracted with creditors under the pledge of the good faith of the Spanish nation shall in all cases be scrupulously respected.’

“In these declarations we find a clear assertion not only of the power of the Government of Spain to deal with the so-called Cuban debt as a national debt, but also a clear admission that the pledge of the revenues of Cuba was wholly within the control of that Government, and could be modified or withdrawn by it at will without affecting the obligation of the debt.

“As to what is stated in the Spanish memorandum touching the aid given to Cuba in the last century or the early part of the present century by the Vice Royalty of Mexico, the American Commissioners might offer certain pertinent historical observations; but they deem it necessary now to say only that Mexico is not making any claim before this Joint Commission, either directly or indirectly. As to the statement that Cuba has produced during a very few years in the

present century a surplus which was turned over to the treasury of the Peninsula, the American Commissioners will cite the justly celebrated *Diccionario Geográfico-Estadístico-Histórico de la Isla de Cuba*, by Señor Don Jacobo de la Pezuela, by which (see article on Señor Don Claudio Martínez de Pinillos) it appears that after 1825 not only were all the expenses of the island paid out of its revenues, but surpluses were sent, annually and regularly, to the mother country. These surpluses from 1850 to 1860 amounted to \$34,416,836. And it is to be observed that in addition to the regular annual surpluses turned over after 1825, extraordinary subsidies were from time to time granted to the home Government. It was for services rendered in matters such as these that Señor Pinillos received the title of Count of Villanueva.

"As to the recent 'advances' to Cuba, referred to in the Spanish memorandum, it is to be regretted that details were not given. But, by the very term 'advances,' it is evident that the Spanish memorandum does not refer to gifts, but to expenditures for the reimbursement of which Cuba was expected ultimately to provide; and the American Commissioners do not doubt that these expenditures were made for the carrying on of the war, or the payment of war expenses in Cuba.

"When the American Commissioners, in their memorandum of the 14th instant, referred to the Cuban insurrection of 1868 as the product of just grievances, it was not their intention to offend the sensibilities of the Spanish Commissioners, but to state a fact which they supposed to be generally admitted. They might, if they saw fit to do so, cite the authority of many eminent Spanish statesmen in support of their remark. They will content themselves with mentioning only one. On February 11, 1869, Marshal Serrano, President of the Provisional Government at Madrid, in his speech at the opening of the Constituent Cortes, referred to the revolution in Spain and the insurrection in Cuba in the following terms: 'The revolution is not responsible for this rising, which is due to the errors of past Governments; and we hope that it will be speedily put down and that tranquillity, based upon liberal reforms, will then be durable.' (Annual Register, 1869, p. 255.)

"The American Commissioners have read without offense the reference in the Spanish memorandum to the Indian rebellions which it has been necessary for the United States to suppress, for they are unable to see any parallel between the uprisings of those barbarous and often savage tribes, which have disappeared before the march of civilization because they were unable to submit to it, and the insurrections against Spanish rule in Cuba, insurrections in which many of the noblest men of Spanish blood in the island have participated.

"Nor are the American Commissioners offended by the reference of

the Spanish memorandum to the attempt of the Southern States to secede. The Spanish Commissioners evidently misconceive the nature and the object of that movement. The war of secession was fought and concluded upon a question of constitutional principle, asserted by one party to the conflict and denied by the other. It was a conflict in no respect to be likened to the uprisings against Spanish rule in Cuba.

“The American Commissioners are unaware of the ground on which it is asserted in the Spanish memorandum that the United States has been compelled to admit that the Cuban people are as yet unfit for the enjoyment of full liberty and sovereignty. It is true that an intimation of such unfitness was made in the note of the Spanish Government on the 22nd of July last. The Government of the United States, in its reply of the 30th of July, declared that it did not share the apprehensions of Spain in this regard, but that it recognized that in the present distracted and prostrate condition of the island, brought about by the wars that had raged there, aid and guidance would be necessary.

“The reference in the Spanish memorandum to the obligations of Porto Rico is not understood by the American Commissioners, who had been led to believe that there was no Porto Rican debt. On June 30, 1896, Señor Castellano, Colonial Minister of Spain, in submitting to the Cortes the budget of Porto Rico for 1896-97, the last one, as it is understood, ever framed, said:

“The duty to report to the National representation the financial condition of Porto Rico is exceedingly gratifying. It shows the ever growing prosperity of the Lesser Antille, which, through the multiplicity of its production and the activity of its industry, has succeeded in securing markets for its surpluses in the whole world.

“It being *without any public debt (sin deuda pública)*, all its necessities being covered, its treasury being full to repletion, its public services being fulfilled with regularity, with economy in the expenses, and with a constant development of the revenues of the state, the spectacle afforded by Porto Rico is worthy of attention.’

“The *Gaceta de Madrid* of July 1, 1896, which published this budget, published also a Law, approved June 29, 1896, providing for the disposition to be made of the surplus of \$1,750,909 in the treasury of Porto Rico at the expiration of the fiscal year 1895-96.

“No Porto Rican Loan was ever contracted or floated before 1896.

“No Porto Rican bonds are quoted in the markets of Europe or America.

“It is possible that the Governor General of Porto Rico may have borrowed money from a bank or from private persons in order to meet in advance expenses authorized by the budget, and that he may have given promissory notes for the amount borrowed, but these notes, paid

on maturity, do not constitute a Porto Rican debt, in the sense claimed by the Spanish Commission.

“Nor is it to be supposed, in view of the flourishing condition of the colonial finances, as explained by the Spanish Minister of the Colonies, that any note of the kind referred to remains unpaid.

“The American Commissioners are not acquainted with the works of the publicists who maintain that the thirteen original United States paid to Great Britain 15,000,000 pounds sterling, presumably for the extinguishment of colonial debts. The American Commissioners, however, feel no interest in the matter, since the statement is entirely erroneous. The preliminary and definite treaties of peace between the United States and Great Britain of 1782 and 1783 were published soon after their conclusion, and have since been republished in many forms. They are the only treaties made between the two countries as to American independence, and they contain no stipulation of the kind referred to.

“Nor do the American Commissioners perceive the relevancy of the citation in the Spanish memorandum of the sums paid by the United States to France, Spain, Russia, and various Indian nations for territory acquired from them. In none of these cases does it appear that the United States assumed any debts. The money paid by the United States was paid for the territory.

“As to the case of Texas, the American Commissioners have only to observe that Texas was an independent state which yielded up its independence to the United States and became a part of the American Republic. In view of this extinction of the national sovereignty the United States discharged the Texan debt. Indeed, the whole reference made in the Spanish memorandum to the case of Texas is quite inaccurate. The United States did not demand of Mexico the independence of Texas. That independence was established by the inhabitants of Texas themselves, and had long been acknowledged, both by the United States and by other powers, before the voluntary annexation of Texas to the United States.

“The payments of money made by the United States to Mexico for territory obtained by the former from the latter at the close of the Mexican war are referred to in the Spanish memorandum, but these payments established no principle. They were made by the United States as a part of the general settlement with Mexico, and it will hardly be argued that if the treaty of peace had contained no stipulation on the subject, anything would have been due from the United States.

“The Spanish memorandum, however, refers to these transactions as if they constituted precedents for the proposal put forward by the Spanish Commissioners for the arbitration by the United States and Spain of the question whether the whole or any part of the alleged

Cuban and Porto Rican debts should be assumed or guaranteed by the United States. The American Commissioners are compelled to take a different view of the subject. They have no doubt that if during the negotiations with Mexico a proposal had been put forward by either party for the arbitration of the question whether Mexico should cede the territories demanded by the United States, or whether if they were ceded the United States should pay for them, and if so how much, such proposal would have been rejected by the other party as entirely inapplicable to the transaction.

“So it is in the present case. The Commissioners of the United States and of Spain have met for the purpose of concluding a treaty which is to terminate a war. The matters involved in this transaction are matters for mutual adjustment and definitive settlement. They are matters to be determined by the parties themselves, and not by any third party. Arbitration comes before war, to avert its evils—not after war to escape its results.

“As was shown by the American Commissioners in their memorandum of the 14th of October, the burdens imposed by Spain upon Cuba in the form of the so-called Cuban debt have been the fruitful source of Cuban insurrections. In the opinion of the American Commissioners the time has come for the lifting of this burden, and not for the submission to a third party of the question whether it shall be lifted at all.

“Having answered so much of the Spanish memorandum as relates to the vital articles of the Spanish proposals, and expounds the Spanish views regarding them, the American Commissioners do not think it necessary to discuss the remaining articles, which may be, for the purpose of this discussion, regarded as merely subsidiary, and as to which they make all necessary reservations.

“Near the close of their memorandum, the Spanish Commissioners say:

“‘It appears by this recapitulation that the only question now pending between the two Commissions and awaiting their decision is a question of money, which, so far as one of the High Contracting parties is concerned, is relatively of secondary importance. That question is the one which relates to the colonial debt.’

“In this conclusion the American Commissioners concur.

“The American Commissioners have maintained that the proposal by the Spanish Commissioners that the United States shall assume the so-called Cuban debt is in reality a proposal to affix a condition to the unconditional promise made by Spain in the Protocol of August 12, 1898, to ‘relinquish all claim of sovereignty over and title to Cuba;’ and they have further maintained that the abstention of Spain from proposing such a condition at that time precludes her from proposing it now. The American Commissioners have declared, and now repeat,

that if such a proposal had been made during the negotiations that resulted in the conclusion of the Protocol it would have terminated them, unless it had been withdrawn.

"In confirmation of the position that the Spanish Commission is now precluded from proposing the assumption by the United States of the so-called Cuban debt, the American Commissioners, besides invoking the unconditional stipulation of the protocol, are able to point to the fact that the Spanish Government, in the correspondence that resulted in the conclusion of that instrument, took the precaution, in replying to the demand of the United States for the relinquishment by Spain of all claim of sovereignty over Cuba, and her immediate evacuation of the island, to refer to the duty which in her opinion rested upon the United States, under the circumstances, to provide for the protection of life and property in the island until it should have reached the stage of self-government. In his note of August 7, 1898, the Duke of Almodovar, replying to the demand of the United States, said:

"The necessity of withdrawing from the territory of Cuba being imperative, the nation assuming Spain's place must, as long as this territory shall not have fully reached the condition required to take rank among other sovereign powers, provide for rules which will insure order and protect against all risks the Spanish residents, as well as the Cuban natives still loyal to the mother country.'

"If to this reservation, which the American Commissioners have declared their readiness to recognize in the treaty, the Spanish Government had desired to add another on the subject of the Cuban debt, the opportunity then existed and should have been seized. Indeed, the insertion of a few words in the reservation actually made would have rendered it applicable to the so-called Cuban debt as well as to the protection of life and property.

"A labored argument is made in the memorandum submitted by the Spanish Commissioners to prove that the Government of the United States in declining to take upon itself the so-called Cuban debt is acting in violation of all principles of international law and assumes an attitude hitherto unknown in the history of civilized nations. Cases supposed to be apposite are cited, showing the assumption of national debts where one sovereignty is absorbed by another, or a division of national indebtedness where a nation is deprived of an integral part of its domain, either by cession, or the attainment of independence by a colony theretofore charged with raising a part of the national revenue. Elsewhere we have pointed out the differences manifestly existing between the cases cited and the one in hand. The United States may well rest its case upon this point upon the plain terms of the protocol, which, as the memorandum submitted by the Spanish Commissioners well says, contains the agreement between the parties—



'for no other was formulated between the two parties,' and which is executed when Spain relinquishes all claim of sovereignty over and title to Cuba. If the question were still open the United States might well challenge the fullest inquiry into the equity of this demand.

"It is urged in the Spanish Commissioners' memorandum that the United States, erroneously believing in the justice of the cause of Cuban independence, made it its own, and took up arms in its behalf. 'The United States,' so declares the Spanish memorandum, 'made a demand on Spain, and afterwards declared war on her, that Cuba might become free and independent.' The causes of the demand of the United States for the termination of Spanish sovereignty in Cuba are amply shown in the history of the events which preceded it. For many years the United States patiently endured a condition of affairs in Cuba which gravely affected the interests of the nation. As early as 1875 President Grant called attention to all its dread horrors and the consequent injuries to the interests of the United States and other nations, and also to the fact that the agency of others, either by mediation or by intervention, seemed to be the only alternative which must sooner or later be invoked for the termination of the strife. During that Administration, notwithstanding that it was clearly intimated to Spain that the United States could no longer endure the situation—which had become intolerable—no unfriendly action was taken, and for ten years it suffered all the inconvenience and deprivation, destruction of trade and injury to its citizens incident to the struggle, which was ended by the peace of Zanjón, only to break out again and to be waged with every feature of horror and desolation and profitless strife which had characterized the former struggle.

"President Cleveland, in his annual message of 1896, was constrained to say to the Congress of the United States: 'When the inability of Spain to deal successfully with the insurrection has become manifest, and it is demonstrated that her sovereignty is extinct in Cuba for all purposes of its rightful existence, and when a hopeless struggle for its reestablishment has degenerated into a strife which means nothing more than the useless sacrifice of human life and the utter destruction of the very subject-matter of the conflict, a situation will be presented in which our obligations to the sovereignty of Spain will be superseded by higher obligations, which we can hardly hesitate to recognize and discharge.' Throughout President Cleveland's Administration this situation was patiently endured, at great loss and expense to the United States, which then and at all times was diligent in maintaining the highest obligations of neutrality, through the vigilance of its Navy and its executive and judicial departments.

"The present Chief Executive of the United States, in his first annual message, in 1897, again called attention to the disastrous effects upon our interests of the warfare still being waged in Cuba. The patient

waiting of the people of the United States for the termination of these conditions culminated in the message of April 2, 1898, of the President to Congress, in which he said: 'The long trial has proved that the object for which Spain has waged the war can not be attained. The fire of insurrection may flame or may smolder with varying seasons, but it has not been and it is plain that it can not be extinguished by present methods. The only hope of relief and repose from a condition which can no longer be endured is the enforced pacification of Cuba. In the name of humanity, in the name of civilization, in behalf of endangered American interests which give us the right and the duty to speak and to act, the war in Cuba must stop.' Acting upon this message the Congress of the United States, in the resolution approved by the President April 20, 1898, which has been so often referred to in the memorandum submitted by the Spanish Commissioners, based its demand that the Government of Spain relinquish its authority and government in the island of Cuba, and withdraw its forces from Cuba and Cuban waters, upon conditions in Cuba (so near the United States) which were declared to be such that they could no longer be endured.

"It is not necessary to recite the record of the events which followed that demand, well known to the members of this Commission, and which are now a part of the history of the world. It is true that the enforced relinquishment of Spanish sovereignty will result in the freedom and independence of the island of Cuba and not in the aggrandizement of the United States. This résumé of events which led to the United States taking up arms is not made to wound the susceptibilities of the Spanish nation, or its distinguished representatives upon this Commission, but, in view of the truth of history and the statements made in the memorandum submitted by the Spanish Commissioners, less could not be said by the representatives of the United States. Not having taken up arms for its own advancement, having refrained from acquiring sovereignty over Cuba, the United States now seeks to attain a peace consistent with its ends and purposes in waging war. In asking, as a victorious nation, for some measure of reparation, it has not emulated the examples of other nations and demanded reparation in money for the many millions spent and the sufferings, privations and losses endured by its people. Its relations to Cuba have been those of a people suffering without reward or the hope thereof.

"The American Commissioners therefore feel that they are fully justified both in law and in morals in refusing to take upon themselves in addition to the burdens already incurred the obligation of discharging the so-called colonial debts of Spain—debts, as heretofore shown, chiefly incurred in opposing the object for the attainment of which the resolution of intervention was adopted by the Congress and sanctioned by the President of the United States. If it could be admitted, as is

argued in the memorandum submitted by the Spanish Commissioners, that the United States in this relation stands as the agent of the Cuban people, the duty to resist the assumption of these heavy obligations would be equally imperative. The decrees of the Spanish Government itself show that these debts were incurred in the fruitless endeavors of that Government to suppress the aspirations of the Cuban people for greater liberty and freer government."

Memorandum of American Peace Commission, Paris, Oct. 27, 1898, S. Doc. 62, 55 Cong. 3 sess., part 2, pp. 100-107.

Closing Spanish argument.

"The American Commission affirms that Spain contracted (it does not say that it used the debt previously contracted) the greatest part of the Cuban debt '*in an effort, first to conquer the Cuban insurgents, and then to oppose the United States,*' and then discoursing upon the same theme, it says, 'that it has not been denied that a part of these loans was directly used to wage war against the United States.' To make such statements it is indispensable to suppose that the dates of the creation of those debts are not known. One debt was contracted under the authority of the Decree of May 10, 1886, that is to say, eight years after the re-establishment of the peace in Cuba, and nine years before the fresh disturbances of the same in that island through suggestions and by means which now are known to the world. The second issue was authorized by Royal Decree of September 27, 1890, that is to say, twelve years after Cuba had found herself in a condition of perfect peace, and at the pinnacle of her prosperity, and five years before the work of her desolation began, through the new rebellion which more or less spontaneously broke out there. And the two Decrees explain also what were the reasons why the said issues were authorized, and what were the expenses to be met by them, the payment of deficiencies in previous and subsequent appropriation bills in the island being prominent among them. It is well known that these deficiencies were due to the great reduction of taxes made in Cuba by the mother country.

"Will it ever be said that Spain, through some supernatural gift of divination, foresaw in 1886 and 1890 that in 1895 an insurrection was again to break out in Cuba, and that in 1898 the United States were to lend it their armed protection? Under no other hypothesis the correctness of the phrases of the American memorandum relating to this point could ever be admitted.

"And so far as the expenses incurred by Spain owing to the war with the United States are concerned, without doubt the American Commission is unaware of the fact that on the 20th of April of the present year, when the hostilities began, the Spanish Government was still engaged in operations of credit, in the shape of bonds, with the direct guarantee of the customhouses of the Peninsula, to the amount

of 1,000 millions of *pesetas*, as decided in 1896 and 1897,—and in other operations to the amount of 223 millions of *pesetas*, as authorized on the 2nd of April, 1898, with the special guarantee of the stamp and tobacco revenues in the Peninsula, as well as the revenues called *de consumo* in Spain,—and that, in order to meet the expenses of the war with the United States, a Royal Decree had been issued on the 31st of May in the present year, authorizing the creation of a 4 per cent perpetual domestic debt, to the amount of 1,000 millions of *pesetas*, out of which 806,785,000 were immediately negotiated. Upon acquaintance with these facts, it is to be supposed that the American Commission will not be willing to insist upon the statement so groundlessly made in its memorandum, as it will then understand that the expenses of the war with the United States have nothing to do with the Cuban colonial mortgage debt.

“The American Commission advocates once more in its memorandum the strange theory that the Spanish colonies are not bound to pay the debt contracted by the mother country to put down the rebellions, whether of few or of many, of their inhabitants. But this time, it reaches the extreme of putting such a singular doctrine *under the shelter of common sense*, by affirming that a doctrine to the contrary would be a threat to liberty and civilization.

“Ah! if the colonists, and the citizens of the Great Republic would have alleged, in justification of a rebellion,—or should allege in the future, in an identical case, an emergency from which that powerful nation is certainly not exempted,—a theory of that kind,—would the American Government have ever accepted it? Will it ever accept it in the future?—What is condemned not by common, but by moral sense, is the attempt to put all rebellion against legitimate authority under the shelter of liberty and civilization. Was Spain, or was she not, the legitimate sovereign of Cuba when the first insurrection broke out, and during the whole term of the second? Has anyone ever dared to deny, or to doubt even, the sovereignty of Spain over that island at the time to which we are now referring? Were not the United States themselves, and their Government, those who day after day urged Spain to put down the rebellion, without excluding the use of arms, and reestablish as promptly as possible the peace in her colony? And if Spain complied with such demands, who, the United States included, can deny the legitimate character of the expenses which, by virtue of that compliance, she necessarily incurred?

“A doctrine of this nature, which the Spanish Commission, through considerations of respect, observed thus far by it, and which it has the duty to observe, does not deservedly characterize as it certainly would be by all the constituted Powers of the earth, can not be advocated in the face of men, except from the standpoint that the authority of Spain was illegitimate, and that her sovereignty was only an arbitrary act of

despotism. And is the crown of Spain characterized in this manner, concretely and specifically, for her domination in Cuba prior to the signing of the Washington Protocol? Can this be done above all by the very same nation which urged Spain to exercise her sovereign authority to conquer those who had risen in arms against her in the island?

“Let us pass to another subject, as the present is too delicate to be treated with calm and serenity in a diplomatic discussion wherein any attempt is made to controvert it.

“In the memorandum which we are now answering, the singular affirmation is made that the mortgage created by the two issues above named can be called more properly a subsidiary guarantee, and that the party principally bound to pay is the Spanish nation. Undoubtedly the American Commission in making this affirmation had not before its eyes Article II. of the Royal Decree of May 10, 1886, authorizing the issue of 1,240,000 hypothecary bonds of the Island of Cuba, or the 2nd paragraph of Article II. of the Royal Decree of September 27, 1890, authorizing the issue of 1,750,000 hypothecary bonds of the same island. Both texts read literally the same, and it will be sufficient for us to transcribe one of them. Their language is as follows: ‘The new bonds shall have the direct (especial) guarantee of the customs revenue, stamp revenue of the Island of Cuba, direct and indirect taxes now levied or to be levied there in the future, and the subsidiary (general) guarantee of the Spanish nation. They shall be exempt from all ordinary and extraordinary taxes, etc.’

“Nor can the American Commission have seen any of the bonds issued under these authorizations, which are scattered everywhere in the world, Cuba included, and are owned by third parties and private individuals; had it seen them it might have read the following: ‘Direct (especial) guarantee of the customs revenue, stamp revenue of the island of Cuba, direct or indirect taxes therein levied or to be levied hereafter, and the subsidiary (general) guarantee of the Spanish nation.’ ‘The Spanish Colonial Bank shall receive, in the island of Cuba, through its agents there, or in Barcelona, through the Spanish Bank of Havana, the receipts of the custom-houses of Cuba, and such amount thereof as may be necessary, according to the statements furnished on the back of the bonds, to meet the quarterly payment of interest and principal, shall be retained daily and in advance.’

“If after this, the American Commission continues to understand that this debt was not contracted as a debt secured by mortgage, and that this mortgage was not placed upon the customs revenues and other taxes of Cuba; and further, that these revenues were not pledged principally and primarily, and therefore prior to the Peninsular treasury, to the payment of interest and principal, we shall have nothing to say. We are unable to prove what is self-evident.

"Turning now to the bondholders and to the severity, in our opinion unjustified, with which they are treated in the American memorandum, we shall say that the duty to defend them does not belong to Spain. When they know what is the opinion entertained about them, it is to be supposed that they will defend themselves, for after all they will not need any great effort to demonstrate the justice of their cause.

"So far as Spain is concerned, and here the Spanish Commission proceeds to answer categorically the questions propounded in the American memorandum, it is sufficient for her to defend the legitimacy of her action and her perfect right to create that debt and the mortgage with which it was secured, and therefore the strict right vested in her not to pay either interest or principal, except upon proof of the insufficiency of the mortgaged revenues, out of which they should be primarily paid. If those who hold those revenues are not willing to comply with the obligations to the fulfillment of which said revenues were pledged, the responsibility therefor will belong to them, and not to Spain, who has neither the means to compel them to comply with that duty, nor is bound to do for the bondholders anything else than what she has honestly done up to now. But Spain, the Spanish Commission says again (and this is the only thing she has textually said, although the American memorandum seems to understand it differently), can not lend itself in this treaty with the United States, nor in any other treaty with any other power, to do or to declare in her name anything which may mean, or imply, that she herself has doubts, and much less ignores or voluntarily abridges, so far as she is concerned, the mortgage rights of the bondholders. She has no efficient means to cause those who may become holders of the mortgaged revenues to respect those rights. Therefore she does not employ them; did she have them, she would employ them, if not through strict justice, at least through a moral duty, thus following the dictates of probity, both public and private."

Memorandum of Spanish Peace Commission, Paris, Nov. 16, 1898, S. Doc. 62, 55 Cong. 3 sess., part 2, pp. 176-179.

"Another object of especial care and attention to the Government of Your Majesty has been that which refers both to the right of many natives of our former colonies to continue to enjoy the fixed annual payments which they receive from the treasury in the nature of pensions, as well as to the right of others to demand, on account of eminent services rendered to the country in person or by those from whom their rights are derived, pensions to reward therefor. It is furthermore but right that those who recover their citizenship should be restored to the enjoyment of the pensions to which they are legally entitled, making the payment of these, nevertheless, depend, as only seems just, upon residence within Spanish territory and the previous examination of their respective claims; and it must be understood that the restoration of their pensions will commence only from the time at which application therefor is made.

"Lastly, natives of the aforesaid territories who can not leave them and who may have rendered, as has been said before, distinguished services to the country, shall be entitled to obtain pensions as a reward, for the Spanish nation can not neglect to protect those who have nobly defended its interests; but the obtaining of said pensions must, in every case, be subject to the special proceedings prescribed by the law of the 12th of May, 1837, as the unusual character of this class of pensions calls for." (Report of Premier Sagasta, May 11, 1901, accompanying the royal decree of the same date, in which his recommendations were embodied, For. Rel. 1901, 475.)

For the text of the decree, see Nationality and the effect of a change of sovereignty thereon.

"In citing the Royal Decrees of 1886 and 1890, and the contents of the bonds issued thereunder, as something with which the American Commissioners were previously unacquainted, the Spanish Commissioners seem to have overlooked or forgotten the paper which the American Commissioners presented on the 14th of October. In that paper the American Commissioners expressly mentioned and described the financial measures of 1886 and 1890 and the stipulations of the bonds thereby authorized. But they did more than this. Being concerned with the substance rather than with the form of the matter, they reviewed with some minuteness the history of the debt and the circumstances of its creation. They showed that it was in reality contracted by the Spanish Government for national purposes; that its foundations were laid more than twenty years before the Royal Decree of 1886, and at a time when the revenues of the island were actually producing a surplus, in national enterprises in Mexico and San Domingo, foreign to the interests of Cuba; and that it was soon afterwards swollen to enormous dimensions as the result of the imposition upon Cuba, as a kind of penalty, of the national expenses incurred in the efforts to suppress by force of arms the ten years' war for the independence of the island. At this point the American Commissioners in their paper of the 14th of October referred to the financial operation of 1886, but they properly referred to it in its true character of a national act for the consolidation or funding of debts previously incurred by the Spanish Government, and expressly quoted the national guaranty that appears on the face of the bonds. At the risk of a repetition which should be unnecessary, the American Commissioners will quote from their paper of the 14th of October the following paragraph:

"Subsequently the Spanish Government undertook to consolidate these debts (i. e., the debts incurred in Mexico, San Domingo, and the ten years' war) and to this end created in 1886 the so-called *Billetes hipotecarios de la Isla de Cuba*, to the amount of 620,000,000 pesetas, or \$124,000,000. The Spanish Government undertook to pay these bonds and the interest thereon out of the revenues of Cuba, but the

national character of the debt was shown by the fact that, upon the face of the bonds 'the Spanish nation' (*la Nación Española*) guaranteed their payment. The annual charge for interest and sinking fund on account of this debt amounted to the sum of 39,191,000 pesetas, or \$7,838,200, which was disbursed through a Spanish financial institution, called the *Banco Hispano-Colonial*, which is said to have collected daily from the custom house at Havana, through an agency there established, the sum of \$33,339.'

"The American Commissioners then referred in the same paper to the authorization by the Spanish Government in 1890 of a new issue of bonds, apparently with a view to refund the prior debt as well as to cover any new debts contracted between 1886 and 1890, and stated that, after the renewal of the struggle for independence in February 1895, this issue was diverted from its original purpose to that of raising funds for the suppression of the insurrection.

"The American Commissioners are at a loss to perceive how, in reciting these transactions, in which past and not future obligations were dealt with, they could have been understood to intimate that Spain, through what is described in the Spanish memorandum as a 'supernatural gift of divination,' foresaw the insurrection of 1895 and the ultimate intervention of the United States. The American Commissioners will not indulge in the ready retort which this fanciful effort at sarcasm invites. Whether the consequences of imposing upon Cuba burdens not to be borne were or were not foreseen by Spain is a question upon which it would be idle now to speculate.

"As to the special 'Cuban War Emergency Loan,' composed of 'five per cent peseta bonds,' which were referred to as part of what was considered in Spain as properly constituting the Cuban debt, the American Commissioners expressly declared that it did not appear that in these bonds the revenues of Cuba were mentioned.

"The American Commissioners, in reviewing in their paper of the 14th of October the history of the so-called Cuban debt, necessarily invited the fullest examination of their statements. They have yet to learn that those statements contained any error.

"They freely admit, however, that they had never seen it asserted till they read the assertion in the Spanish memorandum, that the deficiencies in the Cuban appropriation bills or budgets which the debts are said to represent were 'due to the great reductions of taxes made in Cuba by the mother country.' If, as they are now assured, this is a fact 'well known,' they are compelled to admit that they were, and that they still remain, ignorant of it. Indeed, the American Commissioners were not aware that Cuban appropriation bills or budgets existed prior to 1880, in May of which year the first measure of the kind was submitted to the Spanish Cortes. During the discussion of that budget, a distinguished Senator, not a Cuban, who had been Min-



ister of State in the Spanish cabinet, Señor Don Servando Ruiz Gomez, presented to the Senate an official statement of the Colonial Department, showing that the alleged debts of Cuba amounted to \$126,834,419.25 in gold and \$45,300,076 in paper, or, in round numbers, \$140,000,000 in gold.

"It is true that after 1880, and especially after 1886, deficiencies appeared in the budgets, but a correct conception of their cause may be derived from the budget of 1886-1887, when the prior debts were consolidated. The amount of the burdens imposed upon Cuba by that budget, eight years, as the Spanish memorandum observes, 'after the reestablishment of peace,' was \$25,959,734.79, which was distributed as follows:

"General obligations .....	\$10, 853, 836. 79
"Department of Justice .....	863, 022. 22
"Department of War .....	6, 730, 977. 17
"Department of the Treasury .....	903, 326. 29
"Department of the Navy .....	1, 434, 211. 40
"Department of the Interior .....	3, 935, 658. 92
"Department of Fomento .....	1, 238, 702. 00
	<hr/>
	25, 959, 734. 79

"Of the sum total of this burden, it is seen that the three items of General Obligations, War, and Navy, constitute nearly three-fourths. And what were the 'General Obligations?' The principal item—nine-tenths of the whole—was that of \$9,617,423.02, for interest, sinking fund, and incidental expenses on the so-called Cuban debt. The rest went chiefly for pensions to Spanish officials.

"The budget for 1896-1897 amounted to \$28,583,132.23.

"These figures, which speak for themselves, seem to render peculiarly infelicitous the novel suggestion that the deficiencies in the Cuban budgets have been due to the reduction of taxes.

"As to that part of the Spanish memorandum in which the so-called Cuban bonds are treated as 'mortgage bonds,' and the rights of the holders as 'mortgage rights,' it is necessary to say only that the legal difference between the pledge of revenues yet to be derived from taxation and a mortgage of property can not be confused by calling the two things by the same name. In this, as in another instance, the American Commissioners are able to refer to previous statements which, although the Spanish memorandum betrays no recollection of them, for obvious reasons remain unchallenged. The American Commissioners have shown, in their argument of the 27th of October, that the Spanish Government itself has not considered its pledge of the revenues of Cuba as in any proper legal sense a mortgage, but as a matter entirely within its control. In proof of this fact the American Commissioners quoted in that argument certain provisions of the decree of autonomy for Cuba and Porto Rico, signed by the Queen Regent of

Spain on the 25th of November 1897, and countersigned by Señor Sagasta, as President of the Council of Ministers. By that decree it was declared that the manner of meeting the expenditures occasioned by the debt which burdened 'the Cuban and Spanish treasury' should 'form the subject of a law' wherein should be 'determined the part payable by each of the treasuries, and the special means of paying the interest thereon, and of the amortization thereof, and, if necessary, of paying the principal:' that, when the 'apportionment' should have been 'made by the Cortes,' each of the treasuries should 'make payment of the part assigned to it,' and, finally, that '*engagements contracted with creditors under the pledge of the good faith of the Spanish nation shall in all cases be scrupulously respected.*'

"In these declarations the American Commissioners find, as they stated in the argument above referred to, 'a clear assertion not only of the power of the Government of Spain to deal with the so-called Cuban debt as a national debt, but also a clear admission that the pledge of the revenues of Cuba was wholly within the control of that Government, and could be modified or withdrawn by it at will without affecting the obligation of the debt,' and so long as the stipulated payments upon the debt were made, without violating the engagements of Spain with her creditors.

"No more in the opinion of the Spanish Government, therefore, than in point of law, can it be maintained that that Government's promise to devote to the payment of a certain part of the national debt revenues yet to be raised by taxation in Cuba, constituted in any legal sense a mortgage. The so-called pledge of those revenues constituted, in fact and in law, a pledge of the good faith and ability of Spain to pay to a certain class of her creditors a certain part of her future revenues. They obtained no other security, beyond the guaranty of the 'Spanish Nation,' which was in reality the only thing that gave substance or value to the pledge, or to which they could resort for its performance.

"One more remark, and the American Commissioners have done with the renewed discussion into which they regret to have been obliged to enter on the subject of the so-called Cuban debt. The Spanish Commissioners are correct in saying that the Government of the United States repeatedly urged Spain to reestablish peace in Cuba, and did not exclude the use of arms for that purpose; but the impression conveyed by this partial statement of facts is altogether erroneous, as is also the implied representation that Spain's course in the matter may be considered as a compliance with the demands of the United States. The Government of the United States did indeed repeatedly demand that order be reestablished in Cuba; but through long years of patient waiting it also tried and exhausted all the efforts of diplomacy to induce Spain to end the war by granting to the island either independence or

a substantial measure of self-government. As early as the spring of 1869, not long after the deepening gloom of the ten years' war began to settle upon the island, the United States offered its mediation and its credit for the reestablishment of peace between Spain and her colony. Spain then as afterwards preferred war to the relinquishment of her rule, and the United States did not assume to discuss the legitimacy of the expenses incurred in the pursuit of that policy. But the question of Spain's right to incur those expenses, and that of her right or her power to fasten them as a perpetual burden upon the revenues of Cuba, after those revenues have passed beyond her control, are questions between which the American Commissioners feel neither difficulty nor hesitation in declaring and maintaining a fundamental difference both in law and in morals."

Memorandum of American Peace Commission, Paris, Nov. 21, 1898, S. Doc. 62, 55 Cong. 3 sess., part 2, pp. 198-201.

The military governor of Cuba, under the American occupation, declined to pay claims that arose prior to Jan. 1, 1899, except in that part of Cuba surrendered to the United States forces July 17, 1898. (Mr. Hay, Sec. of State, to the Duke of Arcos, Span. min., Aug. 3, 1900, MS. Notes to Spain, II. 512; Mr. Hill, Acting Sec. of State, to the Duke of Arcos, Span. min., Sept. 20, 1900, MS. Notes to Spain, II. 521.)

## 7. ON CONTRACTS AND CONCESSIONS.

### § 98.

In a series of European treaties relating to the cession of territory, express provision has been made for the fulfillment by the new sovereign of contracts entered into by the old.

By the treaty between Austria and France, signed at Campo Formio Oct. 17, 1797, it was provided (Art. XII.) that "all sales or conveyances, all obligations contracted, either by the cities or by the government or civil and executive authorities of the countries heretofore Venetian for the maintenance of the French and German armies up to the date of this treaty, shall be confirmed and considered as valid."

By the treaty of Paris of May 30, 1814, it was stipulated (Art. XXX.) that "the sums due for all works of public utility on the Rhone and in the Departments separated from France by virtue of this treaty, not yet completed, or which shall be completed after December 31, 1812, shall be charged to the future owners of the territory and be liquidated by the Commission entrusted with the liquidation of the debt of the two countries."

By the treaty between Austria, France, and Sardinia, signed at Zurich Nov. 10, 1859, it was declared (Art. VIII.) that the Sardinian Government succeeded "to the rights and obligations growing out of contracts duly entered into by the Austrian administration for the ends of the public interests especially concerning the ceded territory."

France assumed a similar obligation in the convention with Sardinia of 1860 as to "all the rights and obligations growing out of contracts entered into by Sardinia for purposes of public interests especially connected with Savoy and Nice."

By the treaty of London of 1864, between Great Britain, France, Russia, and Greece, by which, Great Britain renouncing her protectorate, the Ionian Islands were reunited to Greece, the King of Greece undertook "to assume all the engagements and contracts legally concluded" by the government of the islands, or by the protecting power in its name, as well as pensions and indemnities due to various persons.

The treaty between Austria, Prussia, and Denmark, concluded at Vienna Oct. 30, 1864, contains the following provision:

"Art. 17. The new government of the Dukedoms succeeds to all the rights and obligations growing out of contracts duly entered into by the administration of H. M. the King of Denmark for the purposes of the public interests which especially concern the ceded countries. It is understood that all obligations growing out of contracts entered into by the Danish Government relative to the war and the Federal action are not included in the foregoing stipulation. The new government of the Dukedoms shall respect all rights legally acquired by the civil persons or individuals of the Dukedoms. In the event of claims, the courts shall take cognizance of matters of this kind."

In the treaty between Austria and Italy, signed at Vienna Oct. 3, 1866, it is stipulated:

"Art. 8. The government of H. M. the King of Italy succeeds to the rights and obligations growing out of contracts formally entered into by the Austrian administration for purposes of public interest especially relating to the ceded country.

"Art. 10. The government of H. M. the King of Italy recognizes and confirms the railroad concessions made by the Austrian Government in the ceded territory in all their provisions and for their full term, and especially concessions through contracts dated March 12, 1856, April 8, 1857, October 25, 1858.

"From the exchange of the ratifications of this treaty the Italian Government assumes all the rights and obligations attaching to the Austrian Government through the said contracts so far as relates to the railroad lines situated in the ceded territory."

By an additional article to the treaty of peace between France and Germany, concluded at Frankfort May 10, 1871, special provisions were made for the acquisition by Germany of the Railway of the East in Alsace-Lorraine.

The additional treaty between the same powers, signed at Frankfort Dec. 11, 1871, provided:

"Art. XIII. The German Government recognizes and confirms concessions for roads, canals, and mines granted either by the French

Government or by the Departments or Municipalities of the ceded territory. The same will apply to contracts made by the French Government, Departments or Municipalities relative to the leasing or exploitation of the State, Departmental or Municipal properties situated in the ceded territory.

“The German Empire becomes subrogated to all the rights and burdens growing out of the concessions granted by the French Government.

“With respect to subventions in kind or in specie, all credits due to building contractors, lessors, and purveyors, as well as indemnities for appropriations of lands or other indemnities left unpaid by the French Government, will be paid by the German Government.

“As regards pecuniary or other obligations which these conditions imposed on the ceded Departments and Municipalities, the Government of the Empire will see to it that they are strictly performed in behalf of the concessionaries, lessors or contractors.”

By Article X. of the treaty of Berlin of July 13, 1878, Bulgaria engaged to take the place of the Porte in respect of the obligations connected with the railway concessions in the principality; by Art. XXI. the rights and obligations of the Porte in relation to railroads in Eastern Roumelia were declared to remain in full force and effect; and by Art. XXXVI. it was stipulated: “Servia stands in the stead of the Sublime Porte in all contracts relating to railroads.”

By a notice published in the *Journal Officiel* at Tamatave, April 3, 1897, the French resident-general invited all persons  
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holding concessions granted by the Malagasy Government to present him with a copy “either of their title of concession or their title of acquisition” within two months, together with “a detailed statement” of the rights, obligations, and advantages existing under it. They were also to say to what extent they had discharged their obligations, to what extent the Malagasy Government had executed its obligations, and to set forth their precise claims as against the French Government. In case they desired to continue an “exploitation” already entered upon, they were to apply for a provisional permit therefor and to submit themselves to the control of the French agents and of the French laws. In default of compliance with this request they were to be considered as renouncing their concessions, which the Government would dispose of at their risk and peril. It was further stated that the notice did not imply any recognition of the validity of any concession or the renunciation of any rights of the French Government in the premises.

The American ambassador at Paris was instructed that the United States “could not regard such a notice as valid or binding upon American citizens who may have obtained concessions or acquired real property in Madagascar, inasmuch as it appears to be a purely administrative procedure, lacking the most elementary forms of judicial

administration. It is observed," continued the Department of State, "that in default of the parties furnishing the information demanded of them and of their placing themselves 'in accord with the local residents' (whatever that may mean) the parties in interest are to be considered as renouncing their concessions, and it is added that the Government will dispose thereof at the risk and peril of such parties. This announcement is of so singular a character that it behooves this Government to invite, through you, the attention of the French Government thereto, and to advert particularly to its failure to comply with the elementary requirements of justice and equity so far as it might affect the rights of any citizen of the United States."<sup>a</sup>

The French Government replied that the object of the order, the requirements of which were of a general character, was "to enable the local administration to complete the data which it already possesses as to the manner in which were passed, and then executed, the contracts relating to the disposition of the concessions granted by the old Government of Madagascar, either to our citizens or to foreign colonists settled in the large island before our occupation. The requirements which are in question have therefore no other end than to establish the validity of the said concessions, and would therefore not affect property acquired in a regular manner. . . . This inquiry, which will be conducted with the greatest impartiality to all interested parties, whatever their nationality, could not be other than profitable to those who show regular titles and who will justify the execution of the clauses contained in their contract."<sup>b</sup>

The Department of State, while considering this response "somewhat vague," expressed appreciation of the desire of the French Government to obtain complete data in regard to concessions made to foreigners by the Hova Government, as well as the hope that Americans holding concessions would promptly furnish the information desired. "But," said the Department of State, "this Government can not admit the right of the French Government, in the event of the noncompliance of any American citizen with the order in question, to treat his concession as forfeited or subject to disposition by that Government. As stated by me in my previous instruction: 'This Government could not regard such a notice as valid or binding upon American citizens who may have obtained concessions or acquired real property in Madagascar.' In the language of Mr. Hanotaux: 'The requirements which are in question would not affect property acquired in a regular manner.' If your former note to Mr. Hanotaux did not

<sup>a</sup> Mr. Sherman, Sec. of State, to Mr. Porter, ambassador to France, May 29, 1897, For. Rel. 1897, 154, 155.

<sup>b</sup> Mr. Hanotaux, min. of foreign affairs, to Mr. Porter, Am. ambassador, July 22, 1897, For. Rel. 1897, 156-157.

make the position of this Government in this matter entirely plain, you should take occasion to do so now.”“

Under date of December 1, 1898, the Spanish Peace Commission at Paris submitted, in connection with Spain's relinquishment of sovereignty over Cuba and her cession to the United States of Porto Rico, the Philippines, and other islands, certain articles in relation to “grants and contracts for public works and services.” These articles provided that all such grants and contracts in the islands in question should be “maintained in force until their expiration, in accordance with the terms thereof, the new government assuming all the rights and obligations thereby attaching up to the present time to the Spanish Government.” Among such contracts were mentioned that with the Spanish Compañía Transatlántica as to the mails and transportation, that with two English cable companies in Cuba and the Philippines, the railroad concession from Manila to Dagupan, and “all other concessions for railroads now in operation or under construction in Cuba or Porto Rico.” It was added that these were “all the contracts at present recalled, although it can not be stated that there are not others relative to public works and services.”

The American Commission declared that it was “constrained to reject these articles. The United States did not propose,” added the American Commission, “to repudiate any contract found upon investigation to be binding under international law; but no such clauses as are now proposed had been inserted in treaties heretofore made by the United States with Spain, France, Mexico, and Russia for the acquisition of territory, and it might be assumed that the United States would deal justly and equitably in respect of contracts that were binding under the principles of international law.”

The Spanish Commissioners, in a memorandum accompanying protocol No. 21, of Dec. 8, 1898, said:

“It [the United States] refuses, also, to stipulate anything in relation to the respect due to contracts entered into by a legitimate sovereign for public works and services, contracts which materially affect the rights of property of private individuals, which were respected in the treaties of Campo Formio of 1797, of Paris of 1814, of Zurich of 1859, of Paris of 1860, of Vienna of 1864 and 1866, and which Germany respected also when ending the war with France by the treaty of Frankfort of 1871. The American Commission alleged as its only reason for this refusal that the United States in its treaties has never recognized these contracts, as though the United States were the only

<sup>a</sup> Mr. Sherman, Sec. of State, to Mr. Vignaud, chargé d'affaires *ad interim*, Aug. 12, 1897, For. Rel. 1897, 157. See, however, in this relation, *Florida v. Furman* (1901), 180 U. S. 402; *Barker v. Harvey* (1901), 181 U. S. 481.

power controlling the standard of justice which must govern the conventions and the acts of nations."

The American Commissioners, in a memorandum accompanying protocol No. 22, Dec. 10, 1898, replied:

"The American Commission felt constrained to reject the articles tendered by the Spanish Commissioners in respect to contracts entered into for public works and services. It took this step because the nature, extent and binding obligation of these contracts are unknown to the American Commissioners, and they again disclaim any purpose of their Government to disregard the obligations of international law in respect to such contracts as investigation may show to be valid and binding upon the United States as successor in sovereignty in the ceded territory."

Senate Doc. 62, 55 Cong. 3 sess., part 2, pp. 240, 241, 258, 262.

In relation to the alleged claim of Michael J. Dady & Co. as to cer-

**Cuban cases.** tain contract relations between them and the city of

Havana for sewers and paving, it was advised that the question whether the claims ought to be recognized and confirmed as subsisting contracts should be left to the decision of the authorities of Havana, and that, as the administration of the United States in Cuba was of a military nature, and merely temporary, no action binding the island or any of its municipalities to large expenditures and continuing debt ought to be made unless on grounds of immediate necessity.

Griggs, At.-Gen., Jan. 19, 1899, 22 Op. 310.

A concession in due form to construct certain tramways in the city of Havana was granted to one de la Torre in 1892, notwithstanding the objection of a rival company, which claimed the right under a royal decree of February 5, 1859, in which the right to grant new concessions was reserved to the Crown. Subsequently the same concession was advertised at public auction and sold to de la Torre, the rival company failing to bid. Advised, that the owners of the de la Torre concession have a *prima facie* right to proceed at their own risk, under the permission of the municipal authorities.

The military order of December 24, 1898, forbidding the making of any grant or concession in the future, was not intended to apply to those previously made in due form.

Griggs, At.-Gen., July 10, 1899, 22 Op. 520. For a report and decision holding the contract between the United Railways of the Habana and Regla Warehouses (Limited), and the Cuban and Pan-American Express Co. to be valid and lawful, see Magoon's Reports, 534. Concerning the concession owned by the Habana Canal Company to canalize the Matadero River, see Magoon's Reports, 571, 579. See, also, Magoon's Reports, 534.



"A report by the law officer of the Division of Insular Affairs in the matter of the concession to canalize the Matadero River is inclosed herewith, bearing my approval.

"It is evident that some confusion has existed in the treatment of such subjects in Washington and Habana, arising from the widely different systems of law and judicial procedure, which form the point of departure for opinions and decisions rendered in the two places. The same terms used in the different places sometimes carry widely different meanings. The principle to which the Department has endeavored to adhere, and which was definitely determined upon at the beginning of your administration of Cuba, is that such decisions as the Department makes upon questions of this character will be limited to decisions for the purpose of guiding administrative action, and that the Department will not undertake to perform the functions of a court to determine rights of individuals. The decision made in the Matadero Canal case on the 5th of October, 1899, was of this description. It was not designed to determine the rights of the persons claiming the concession, but to determine the duties of the military administration of Cuba in its administrative treatment of that concession, and the fourth clause of that decision was supposed to adequately express that limitation.

"The secretary of public works apparently gave to the decision that the concessionaires had a *prima facie* right a much more extended and unwarranted force when he declared that the *prima facie* right had the force of an undisputed right until declared to be *null* by the proper authority. The decision made by the War Department gave no force or effect whatever to the concession when presented to a court, relieved the concessionaires from no burden of establishing their rights in court, and had no effect whatever except as governing the action of the administrative officers of the military government. It required that you should withdraw the prohibition which your predecessor had established by military order against the exercise of whatever rights the concessionaires may have had, leaving the concessionaires to prosecute their rights precisely as if that military order had never been given. That course should be followed now. The withdrawal of that order will not, however, prevent the military government from disputing in any court of competent jurisdiction the validity of the concession, either as complainant or as defendant, just as any individual whose rights may be affected may dispute it, and in any such proceeding the claimants of rights under the concession will be bound to establish their rights precisely as if no such decision had been made; nor does this decision, or the withdrawal of the prohibitory order under it, prevent the taking of the customary proceeding, in case the concession should be held to be valid, for its annulment upon the ground that it is detrimental to the public interests.

"There is one matter upon which the decision of the Department, however, is conclusive, and which is not deemed to be open for determination by any court, and that is upon the power of the Spanish Government to grant such a concession on the 28th of August, 1898. That is a political, not a judicial, question, and the view taken by the Department is that the date itself is not conclusive. Each such case must be considered by itself on its own merits. Acts of Spain in Cuba between the signing of the protocol and the evacuation, done in good faith and in the ordinary exercise of governmental powers, are to be treated as the valid acts of a government *de facto*, while acts done for the purpose of withdrawing or withholding property or valuable rights from the government about to succeed, and not done in good faith for the legitimate purposes of government, are to be treated as invalid."

Mr. Root, Sec. of War, to Maj. Gen. Wood, Military Governor of Cuba, May 29, 1901, *Magoon's Reports*, 594-595.

"I have the honor to acknowledge receipt of your communication of June 5, 1901, respecting the concession for canalization of Matadero Creek, Habana, and requesting further explanation of the administrative policy adopted by the War Department with reference to alleged concessions granted by the Spanish government of Cuba after the protocol of August 12, 1898, was signed. In answer thereto allow me to say:

"The United States, on August 12, 1898, by reason of successful military operations, had induced Spain to sue for peace and was in a position to require Spain to comply with its demands. But the United States had not effected a complete conquest of all Cuba, because all parts of the island were not in possession of our military forces. Under the laws of war, as long as Spain continued in possession of territory in Cuba, so long Spanish sovereignty continued over that particular territory, and the proprietary title in and to public property therein situate belonging to the Crown under Spanish law would remain with the Crown of Spain. While this condition continued, the Government of Spain would be justified in exercising sovereign powers in said territory, and the Crown of Spain would be justified in exercising the ordinary privileges appurtenant to the proprietary title of public property under the laws of Spain, provided such action as was taken was in good faith, i. e., with due regard to the rights of its adversary.

"This condition was terminated by the treaty of Paris. By that instrument sovereignty and title in Cuba (art. 1) and proprietary title to the public property in the island (art. 8) were relinquished by Spain, and provision made that 'upon its evacuation by Spain' the island was to be 'occupied by the United States,' and that the United States should 'so long as such occupation shall last assume and discharge the

obligations that may under international law result from the fact of its occupation.' . . . (Art.1.)

"The right of the United States to administer sovereign powers in Cuba, and its right to the proprietary title of public property theretofore possessed by the Crown of Spain, were completed by and date from the treaty of Paris, December 10, 1898. It is therefore inaccurate to say 'all these grants involved property or valuable rights *belonging to the future government of Cuba.*'

"When attempt is made to exercise rights under an alleged concession purporting to have been granted by officials of the Spanish government of Cuba, after the signing of the protocol of August 12, 1898, the military government of Cuba is required to consider the matter in two phases, the first being—

"Was said grant justified by the laws of war? That is to say: (a) Was Spain in possession of the territory affected? (b) Was the sovereignty of Spain attached thereto? (c) Did Spain act in good faith toward its adversary?

"The second phase is—

"Was said grant justified by the laws of Spain? That is to say: (a) Was the grant authorized by the laws of Spain? (b) Were the requirements of the Spanish law fulfilled in making said grant?

"The first phase is to be passed upon and the questions involved determined by the authorities charged with maintaining the rights and promoting the purposes of the United States in Cuba, for the reason that said questions involve the relative and respective rights of the United States and Spain as affected by a war in which the United was the victor. In matters of this character the official so charged is the military governor.

"The second phase is to be passed upon and the questions involved determined by the judicial branch of the military government of Cuba, for the reason that the determination of said questions requires the exercise of judicial functions ordinarily performed by courts, and the administrative policy in Cuba is to permit the courts to perform those functions of government termed judicial. In determining the questions properly to be considered by him, the military governor should exercise care not to preclude the possibility of the courts examining and determining the questions involved in the second phase.

"Where the military governor determines in favor of a concession the determination should be declared as follows:

"The United States makes no objection to this alleged grant by Spain, nor to the terms and conditions thereof (insert description); provided said alleged grant was made pursuant to lawful authority and procedure under the laws of Spain in force in the territory to which the concession appertains at the time the grant was made. The questions of authority and procedure under Spanish law are to be

determined by the courts of Cuba when involved in cases properly pending therein.'

"When the determination is against a concession it should be declared as follows:

"The United States objects to this alleged grant by Spain (insert description), and refuses to recognize the same as valid. Therefore the military government of Cuba prohibits the assertion or exercise of any rights or privileges thereunder."

Mr. Root, Sec. of War, to Maj. Gen. Wood, Milit. Gov. of Cuba, June 21, 1901, Magoon's Reports, 602-603.

A citizen of Porto Rico applied to the Secretary of War in 1899 for a concession of the right to use the water power of the river Plata in Porto Rico. It appeared that under the Spanish law in Porto Rico, prior to the cession to the United States, the Crown of Spain was the owner, for public use, of the proprietary rights of the natural beds or channels of rivers, both navigable and unnavigable, to the extent covered by the waters in their ordinary greatest swells. It seemed that the applicant, before the cession, had taken the preliminary steps which would have enabled him to apply to the governor of the province for the desired concession, but that he had not in fact obtained such a grant from the governor when the powers of that official ended. Advised, that if at the time when the treaty of cession took effect the applicant had had a completed and vested right to the use of the waters of the river, that right would be respected by the United States, but that, as it appeared that by the Spanish law the granting of the desired concession after the preliminary steps were taken was a matter of discretion, resting in the judgment of the governor of the province, who was the royal representative, no vested legal right had been acquired, and that the President, acting through the War Department, had no power to grant the application, the power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States being vested by the Constitution in Congress.

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cases.

Griggs, At.-Gen., July 27, 1899, 22 Op. 546. The Attorney General, in the course of his opinion, stated that he was unable to agree with the opinion expressed in the report of the law officer of the War Department that the application filed under the Spanish law was to be considered as similar to a homestead entry under the laws of the United States. See Magoon's Reports, 495.

Under Spanish law a tramway is a railroad constructed on a public highway.

A concession for the construction of a certain electric tramway in Porto Rico being inchoate and incomplete and lacking certain public action necessary to be taken by the public authorities representing the

Crown of Spain before it could go into effect as a complete grant, the War Department has no authority to grant or complete such concession.

Griggs, At.-Gen., July 28, 1899, 22 Op. 551. See, also, Magoon's Reports, 432.

The Manila Railway Co., Limited, a British corporation, obtained from the Spanish Government a concession, confirmed Case of the Manila Railway Co. by royal decree, for a railway from Manila to Dagupan, island of Luzon, a distance of about 130 miles. By the terms of the concession the Spanish Government guaranteed a return of 8 per cent per annum on the capital invested, which originally amounted to \$4,964,400, but which was subsequently increased, with the concurrence of the Spanish authorities, to \$5,353,700.89. The Spanish Government fulfilled this obligation by paying the subvention in quarterly installments till the war with the United States. After the ratification of the treaty of Dec. 10, 1898, by which the Philippines were ceded to the United States, the railway company made a claim against the United States for the payment of the quarterly installments due March 31, June 30, and Sept. 30, 1899, amounting in all to \$237,068.97.

Advised, that the obligation in question was to be considered as the personal obligation of Spain, and that, as it was not assumed by the United States in the treaty of peace and cession, it did not pass with the sovereignty of the islands to the United States.

Report of Mr. Magoon, law officer, Division of Insular Affairs, Dec. 21, 1899, approved by the Secretary of War, Magoon's Reports, 177. "As the case now stands the company has the obligation of the National Government of Spain. Up to this time the representatives of the United States authorized to bind it have refused to assume said obligation. The most the railway company can assert is that said obligation of the Spanish Government has now become a charge upon the conscience of the sovereign people of the United States. If it were conceded that said obligation had become a charge upon the conscience of the sovereign people of the United States, the manner in which and extent to which the duty so created is to be discharged must be determined by Congress." (Id. 193.)

"I have the honor to acknowledge receipt of the following request for an opinion:

"WAR DEPARTMENT,  
"Washington, July 2, 1900.

"SIR: I have the honor to inclose herewith papers relating to the claim of the Manila Railway Company, Limited, for quarterly subventions under the concession granted it by Spain, and to request your opinion as to what obligations, if any, exist under said concession either against the revenues of the Philippine Islands or those of the United States; and if any such obligations do exist as to what action can legally be taken in recognition and settlement thereof by the exec-

utive department of the United States or the military government in those islands.

“With these papers are inclosed a copy of the note of the British ambassador at this capital, and of the report of the law officer of the division of customs and insular affairs.

“Very respectfully,

“ELIHU ROOT, *Secretary of War.*

“(Inclosures:) Copy of Judge Magoon’s report, 849 and incs. 1 to 46, except 18 and 29, with p. c. The return of which papers is requested.’

“I perceive that the subvention as claimed is calculated from January 1, 1899. This date, of course, was more than three months before the ratifications of the Treaty of Paris were exchanged, and therefore before the sovereignty of Spain over the Philippines was formally terminated. So far as there may be a liability of the sovereign Government as distinguished from that of the Philippine Islands or provinces therein, it would seem necessary to consider whether the concessionaire must not look to Spain rather than to the United States for indebtedness accruing prior to such exchange of ratifications.

“The facts seem to be that, according to the method familiar to Spain, a project of a railway from Manila to Dagupan, on the northern coast of Luzon, was, in pursuance of a royal decree of the 9th of April, 1885, made the subject of a public auction held at Madrid and also at Manila. At that auction Mr. Edmund Sikes Hett was the only bidder, and by a royal order of the 21st of January, 1887, he was declared the concessionaire authorized to build the road. Afterwards Mr. Hett duly assigned his rights to the company mentioned by you, and that company, an English corporation, proceeded to construct the road, and now owns it, and prefers a claim against the United States, or whom it may concern, to be paid certain sums of money in accordance with the terms of the concession.

“The royal decree first referred to, dated the 9th of April, 1885, was as follows:

“ART. 1. The Government will assist the construction of the railway from Manila to Dagupan, guaranteeing an interest of 8 per cent per annum on the capital which is spent on the works, reserving to itself the right to recoup itself the *two-thirds part of the amounts which for this purpose it may pay from the local funds belonging to the provinces which the aforesaid line crosses, in accordance with the practices established for other public works in the Philippine Islands.*

“ART. 2. The subvention with which the concessionaire shall be assisted shall be paid over every three months, handing over at the end of every term the amount which belongs to the section or sections working during the three months, for guaranteed interest.

“The quantity which shall be paid every three months as subvention shall be determined by discounting from the amount which represents the guaranteed interest corresponding to the section or sections in working, 50 per cent of the gross products of the aforesaid working.

“When the 50 per cent of the gross products of the working exceed the amount which represents the guaranteed interest the excess shall be divided equally between the concessionaire and the treasury.

“ART. 3. The maximum capital which shall receive the interest of 8 per cent per annum, and which shall serve as a type for the auction for the concession of the line, is fixed in 4,964,473.65 pesos.’

“The amount of capital appears to have been increased to the extent of about a million pesos. It appears that the pesos in question were held by the courts of Spain to be payable in the Philippine Islands, and that they were therefore Philippine pesos, the value of which is a matter of importance in the disposition of this claim as regarded by me.

“As was likewise usual in such cases, a schedule of special conditions was published in advance of the auction, giving details of the work to be done by the concessionaire, the point at which the road was to start, referring to royal orders and decrees to which the whole business was to be conformed, specifying the stations and the kinds or classes of stations, the amount and character of rolling stock, providing for the establishment of an electric telegraph line and the use of it by the concessionaire and by the Government, and many other details expressed in 33 articles. This schedule of special conditions was dated the same 9th of April, 1885. Among the articles were the following:

“4. The Government shall aid the construction of the line by guaranteeing eight per cent annual interest on the capital employed therein.

“10. . . . The sum which the *treasury of the Philippine Islands* is to pay quarterly as subvention shall be fixed by deducting from the sum representing the guaranteed interest corresponding to the section or sections in working 50 per cent of the gross proceeds of such working. . . .

“18. The electric telegraph of the line shall be established for the service of the same, but the concessionaire shall be bound to place as many as four wires for the telegraph of the State, immediately the government of the island shall so require him, there being for his account the establishment and maintenance, and for account of the State the service of the official and private correspondence. The Government and the concessionaire may, however, agree that the functionaries of the former shall carry on the telegraphic service of the railway.

“The concessionaire shall furnish the locale necessary for the telegraph station of the Government at the railway stations where it may be thought proper to have them, the establishment of such stations and their maintenance and service being for account of the State.

“He shall also furnish the locales necessary for the inspections of the Government.

“He shall also provide in the trains determined upon, the locale corresponding to the services of mails, the carriage whereof shall have to be always gratis, as also the carriage of the correspondence in all other trains.

“The transports of the State, both civil and military, and those of prisoners or persons for trial, shall be effected for a moiety of the tariff prices.

“22. The concessionaire shall be subject to the tariff of maximum prices of toll and transport, which tariff may be revised and amended by the Government in accordance with what is expressed in article 32 of the royal decree aforesaid of the 6th August, 1875.

“23. The concession is granted for 99 years, according to these conditions, and to the tariffs approved and subject to all that is provided by the said royal decree of the 6th August, 1875.

“27. Upon the expiration of the term of the concession the State shall acquire the line with its rolling stock and all its dependencies, entering into full ownership thereof and in the full enjoyment of the right of working it.”

“It is apparent that this contract was recognized as one of utility to the Government of Spain, and one of benefit to the provinces in the island of Luzon through which the road was to pass. Ultimately, as we may infer from the royal decree of April 9, 1885, those provinces were to bear two-thirds of the expenses of the guarantee. The whole guarantee was to be paid from the Philippine treasury; but I do not understand that to mean that it was to be paid wholly from moneys belonging to the local funds of the Philippines, but ultimately, to the extent of one-third, from the royal or peninsular funds in the Philippine treasury; or, at all events, as in part a subsidy recognized by the general policy of Spain as chargeable to herself.

“All of the colonial laws and regulations of Spain concerning public works, railroads, and the police of railroads in the Philippines are not before me; and I have examined principally those concerning Cuba and Porto Rico, which are chiefly an extension to the colonies of the ones in force in the Peninsula. I have examined also divers concessions concerning railroads, cables, etc., in Cuba and the Philippines. The same procedure seems to have been pursued in the Philippines as elsewhere. I therefore quote, as throwing light upon the present concession, the following article of the law of railroads for Spain, Cuba, and Porto Rico, extended to Cuba in 1883 and promulgated in Porto Rico in 1888:



“Art. 13. The provinces and towns directly interested in the construction of a line of general service shall contribute with the State to the subsidy granted, in the proportion and manner prescribed by the law referred to in Article II.; i. e., the special law granting the concession.’

“In article 50 of the regulations for executing that law, we read:

“If the aid consists of the delivery of a sum in specie or bonds and stocks, it shall be paid to the company in the form and time stipulated, always on a certificate of the engineers of the State charged with the inspection. The payment of the subsidies in these cases shall be made to the company by the Government directly, and the Government in its turn shall be paid by the province and the town the part of the subsidy devolving upon them, as determined by the law. \* \* \* (Thus far the regulation is identical with that of 1877 for Spain, extended to Cuba in 1883.) If the subsidy consists of the exemption of customs duties, the formalities determined in the existing provisions or those provided in the future by the proper law or regulations shall be complied with. If the subsidy consists in the guaranty of interest, there shall be paid semiannually to the company by the public treasury of the island the difference between the net earnings, after deducting what is provided for in the special clauses of the concession, and the said interest. When, during four consecutive periods of six months, the net earnings of the operation shall equal or exceed the interest guaranteed, the right to such interest shall cease; but the treasury may continue to collect half of the excess on the said interest until it shall have been repaid for the advances made, if it has been so stipulated in the special clauses of the concession.’

“The contract of concession has not been fully executed, but was, in some respects, to remain executory for eighty-seven years. It was a contract between the Spanish Government and the railroad company. The promises were made by the one to the other. I am of opinion that an identical contract between the United States and the company was not created by the ratification of the Treaty of Paris, and does not exist.

“We need not inquire whether the contract would now survive had the Philippine government, or the provincial deputations, regarded as autonomous or even as merely part of the royal Government, made it, and had the benefits of it been wholly received by the provinces or archipelago. For the contract was made by Spain and partly for her own benefit. It was the indivisible personal contract of Spain and of the concessionaire.

“It seems to be the consensus of opinion among authorities on international law that, upon the separation of part of a country from the sovereignty over it, debts created for the benefit of the departing portion of the country go with it as charges upon its government.

- “Hall’s International Law (4th ed.), p. 98.
- “Rivier, *Droit des Gens*, Tome 1, pp. 70, 72.
- “Calvo, *Le Droit Intern’l*, T. 1, sec. 101; T. 4, sec. 2487.
- “Phillimore’s *Inter. Law* (2d ed.), vol. 1, pt. 2, secs. 136, 137.
- “The Tarquin, *Moore on Arbitrations*, vol. 5, p. 4617.
- “Lawrence’s *Wheaton’s Inter. Law*, pp. 53, 54.
- “Wharton’s *International Law Digest*, sec. 5.
- “Anglo Saxon Review, June, 1899, Mr. Reed’s article concerning the Philippine debt, etc.
- “Dana’s *Wheaton’s Intern. Law*, sec. 30, note.
- “Glenn’s *International Law*, sec. 28.
- “Field’s *International Code*, secs. 24 and 26.
- “Gardner’s *Institutes of Intern. Law*, p. 52.
- “Sen. Doc. 62, 55th Congress, 3rd sess., pt. 1, p. 50.
- “Various bases are given for an obligation of a locality and its new government. The chief one is that a benefit goes with its attached burden. Another is the legal right of the original sovereign to bind the locality to pay any debt, even if not for local benefit. (Bluntschli, *Droit International*, sec. 59.) A third is the possession by the new government of the funds or revenues out of which the debt was to be paid. This obviously happens in the case of a revolutionary government getting control of the whole national territory. Still another is the fact that the creditor was lawfully induced to rely, and did rely, upon funds which are now in the possession of the new government. And as for the binding or mortgaging of the locality, it is not to be understood that more is meant, or now commonly practiced, than for a sovereign to agree that certain local objects or revenues should be bound. The creditor is not, as formerly, given a city or province in mortgage, with a right of sovereign jurisdiction. (Heffter, *Droit International*, sec. 71.)
- “As for the nature of the obligations supposed to bind the locality, they are not confined to simple debts, but are said to extend to boundary settlements, right of navigating rivers, right to maintain monasteries, colleges, etc. (Bluntschli, *Droit International*, sec. 47.)
- “As already suggested, all the promises of every contract entered into by the former government of a province wrested from it by victory in war do not transfer themselves to the new government, in defiance of the natural proposition that a man can not be bound by a stranger’s promises. But benefits may be received by a province as well in pursuance of a personal contract of the sovereign partly for his own benefit as otherwise. They are none the less benefits received and retained by the province, and if the burden of the contract itself does not go with them, the burden of an obligation to do equity toward the contractor who has supplied them does go with them.

“There is an obvious difference between a mere debt for the repayment of a loan and an executory contract containing many stipulations to be performed on one side and the other. Where the former exists, and there are thousands of bonds, perhaps, in the hands of individuals, second or third holders of them, it would be obviously inconvenient, and seldom necessary to the ends of justice, to attempt to make a distinction between the real value of a work and the loan obtained by the original contracting sovereignty, so as to confine the obligation of the succeeding sovereign to such real value of the work, the benefit of which he gets.

“There is also a clear difference between ordinary executory contracts and contracts to convey lands. Chief Justice Marshall says, in *Souland v. United States* (4 Peters, 511):

“‘The term “property,” as applied to lands, comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract; those which are executory, as well as those which are executed. In this respect the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away.’

“This was said concerning uncompleted titles to the public domain in Louisiana. In respect to public domain a contract to convey would, according to this view of the matter, be regarded as equitably diminishing the ownership of the sovereign who contracted, so that he could not afterwards convey an unincumbered title to a third person. Accordingly, the land in the hands of the third person might well be regarded as his only to the extent that it had not so been contracted about. But this would not mean that the third person was substituted as a contractor for the original contractor, so as to be obliged by the obligations which he had never stipulated. It would mean merely that he got no more title than was equitably left in his grantor at the time of the grant.

“The concessions here in question are executory contracts, not concerning the public domain owned by Spain, but containing many personal obligations of Spain and of other parties. Spain is regarded by the law of nations as having a personality of her own distinct from that of the power which has succeeded her in control of the ceded territory, and I am not aware of any authority for saying that such personal obligations, either on the part of the Government of Spain or the other contracting parties, become binding as contractual obligations upon a government which made no such promises, or upon the individual toward a government to which he made no such promises. Hall says (*International Law*, sec. 27):

“‘With rights which have been acquired and obligations which have been contracted by the old state as personal rights and obligations the

new state has nothing to do. . . . The new state, on the other hand, is an entirely fresh being. It neither is, nor does it represent, the person with whom other states have contracted. They may have no reason for giving it the advantages which have been accorded to the person with whom the contract was made, and it would be unjust to saddle it with liabilities which it would not have accepted on its own account.'

"The fact that in certain treaties of cession contracts, regularly entered into for objects of public interest specially concerning the ceded territory, are taken over by the new sovereignty, can not be accepted as proving that without treaties all such contracts become obligatory upon the acquiring sovereignty. The stipulations of treaties are sometimes confirmatory of the law of nations, sometimes different from it. Presumably they should be regarded as not identical with it, since nations may well be presumed not to make unnecessary stipulations or fail to obey the law of nations.

"Calvo (sec. 101) does not seem to regard such treaties as mere repetitions of the law of nations; and Hall (sec. 27, note) reminds us of the motives of policy which govern the making of these as of other treaties. The stipulations are no doubt the result of the existence of general principles of the law of nations concerning debts and contracts as affecting an acquiring sovereignty; but those principles may well fall short of the proposition that all executory contracts by the central government for imperial rights and privileges, as well as local benefits, become obligatory as such contracts in all their terms upon the victorious sovereign acquiring the locality.

"As I have suggested, these concessions, made by a military monarchy for cables and railroads through its colonies, were by no means entered into without regard to the benefit and conveniences of the central government as sovereign over the colonies. They were, and this appears upon their face, concerning instruments with which the monarchy was to govern more easily and conveniently the subject colonies, for the general benefit of Spain as well as their own.

"To regard them as exclusively for local benefit would, therefore, be to ignore obvious facts.

"A debt or executory contract by a city or province, whether made by its people or by imperial authorities over it, for gas or irrigation works or other local works, including railroads of only local use, presents another question altogether. He who contends that the liability in such a case is destroyed by a mere change of sovereignty over the city or province, has clearly an unjust cause to maintain.

"It may well be that the treaties in question, some of which speak of 'contracts for objects of public interest, especially concerning the ceded territory,' intended to include only contracts for objects which were, or were supposed to be, or were liberally treated as being, local

objects, and not contracts for combined local and imperial objects. Probably neither a debt, nor even an executory contract of a city for gas works, or of a province for irrigation works or railroads of purely provincial interest, can justly be repudiated upon a change of imperial sovereignty, whether made by the people of the city or province or by imperial agents duly authorized to act for either. On the other hand, to charge the ceded province with contracts or debts for imperial objects, such as those concerning the relations between the central government and the locality, can not be justified by the mere fact that the contract concerns also local objects.

“But it may be said that contracts of this kind may properly be charged to the new sovereignty, which will be interested in the imperial objects and own the province. The old machinery for holding and ruling the province can serve as well the new as the old sovereignty, and therefore the law requires the former to fulfill the contract made by the latter.

“Such a principle might, perhaps, be conceded if it were a fact that the relations between the new sovereignty and the province and the uses to be made by the new sovereignty of the province were, or could be presumed to be, identical with the preexisting relations and uses. But a presumption of the kind must be rested upon a great preponderance of probabilities, and no such preponderance exists. Geographically, politically, commercially, every way, a province or piece of territory will probably have different relations with the new and the old sovereignty. Take, for example, the colony of Florida, ceded by Spain to the United States. Of what use has Spain’s machinery for exploiting, holding, and governing that colony been to the United States? Take Gibraltar and its connection with Spain and England. Take almost every instance of cession. Even in the instances of border provinces ceded to the neighboring nations, machinery for dealing with them from the east and protecting the border against a western enemy would ill suit the western sovereignty, while the old sovereign might have a monarchical and the new a democratic and autonomous system governing the province.

“Nor should we, in inquiring whether the nation have consented to a rule of law to the effect that contracts made by the old sovereignty for local and imperial objects shall be obligatory as such upon the new sovereignty, forget the extraordinary effects which must flow from such a law. What is there that may not be contracted for? What imaginable stipulations may not be made? To agree in a treaty to be bound by actual, known contracts, and to assent to a law about contracts in general, are two different things. Could nations commit themselves to anything more embarrassing and unsafe than a legal obligation to carry out specifically any promises whatsoever that may be made by others in any contracts for imperial and local objects? It

seems to me not, and that whoever asserts that nations have by common consent established such a law must furnish abundant and indisputable authority, whereas, as Hall says (sec. 217), this subject 'is one upon which writers on international law are generally unsatisfactory.'

"Servitudes or easements, completely granted or established upon the ceded territory for the benefit of a foreign nation, have been supposed to diminish by so much the title of the owner of the province, so that when he cedes it he cedes it subject to the servitudes. On the other hand, it may be that the owner of the province may acquire from a foreign power a servitude over foreign territory for the benefit of the province, in such a way that it would become appendent or appurtenant to the province and go with it into whosoever hands the province might be transferred. This seems to be the meaning of Hall (*International Law*, 4th ed., p. 98) in speaking of the navigation and regulation of a river. In such a case the obligation runs with the land, and may be regarded as other than a mere personal obligation. But this is no reason for treating personal obligations, stipulated in an executory contract, as not personal obligations, simply because they may have some relation to a particular ceded locality.

"I am unable to regard these contracts of concession, with their manifold personal stipulations, as other than what they purport to be; and the difference between them and servitudes, diminishing the title of the owner prior to the cession or appurtenant to the province ceded, or contracts to convey public lands, or what we conceive of as a 'franchise' to accomplish (as here) a public duty of the sovereign of the ceded province, or even a private (e. g., eleemosynary) work, where such franchise exists otherwise than as but an integral part of such an executory contract of the sovereign of the province as we have under consideration, seems to me to be an obvious one. These contracts are contracts. They are whole things with interdependent parts and reciprocal personal promises. We can not change their nature by calling them by other names, or repeating the word 'local' in connection with them. As such personal contracts, their promises bind those who made them. Any obligation of others in connection with their subject-matter is something different from the contract obligation, and may or may not coincide with the terms of the specific promises.

"When we look into the present instance, we find the large capital upon which the subsidy was calculated has long since been invested by the railway company. The provinces of the Philippines have undoubtedly received, and they retain and will retain, the chief benefit from the railroad; the revenues out of which that part of the benefit was to be paid for are now in the hands of their new government; the creditor was induced very properly to look to those revenues for that purpose; and, moreover, the railroad was a most necessary piece of property, two-thirds of which was bought, as it were, by a guardian for the use

of his ward, the price to be paid as to two-thirds from the funds of the ward. The property has been furnished and is being maintained, and, from its nature, will be maintained, and must continue to benefit the ward, whose funds are now freed from the guardian's control. From these considerations it seems to me to follow that, although the contract as such has departed with Spain, there is a general equitable obligation upon the provinces to make some fair arrangement with the company as to the two-thirds benefit, and that they can not justly take advantage of the disappearance of Spain to retain what she procured for them, on the credit of their funds, and deny all liability for the price.

“Whether, based exclusively upon the reception (for the future, and, so far as geographical, political, and other differences will permit, a benefit to continue) of the benefit of the railroad, the United States has incurred any liability affecting one-third or any such portion of the original indebtedness, it is unnecessary to consider, since if so it will be for Congress to deal with it.

“So much in answer to your question as to what obligations, if any, exist under said concession, either against the revenues of the Philippine Islands or those of the United States.

“You ask, if any such obligations do exist, what action can legally be taken in recognition and settlement thereof by the executive department of the United States or by the military government of those islands.

“It seems to me that the nonaction of Congress has confirmed to the President the responsibility and authority to continue the military government he has set up in the Philippines, as the only government, for the present and for an uncertain time, of a peopled country whose future permanent status is undetermined. (Treaty of Paris, Article IX.; opinion Attorney-General, July 22, 1898, concerning Hawaii.) Under such circumstances, I am of opinion that the President is not without authority to settle a preexisting accrued indebtedness of the kind herein explained, if he has good reason to believe that the settlement can not wisely and justly be left to await action by the future government.

“It is represented in the papers submitted to me that the large deficiencies in the receipts of the railroad company, occasioned by the disturbed state of affairs, etc., threaten its bankruptcy. If so, this is a fact which may be considered in determining the propriety of present action.

“You desire to know what particular action can be taken. I am of opinion that the President has authority, if he thinks it necessary, to apply the local revenues of the provinces through which this road extends to the discharge of their equitable liability, based upon so much of the concessionary agreement as has been already executed,

the amount of which liability he has authority to determine, in view of all the facts and circumstances. And what he can do the military government can do with his consent."

Mr. Griggs, Attorney-General, to Mr. Root, Sec. of War, July 26, 1900, 23 Op. 181; affirmed by Knox, At. Gen., June 14, 1901, id. 451.

"With reference to your inquiry as to what settlement was finally made with the Manila Railway Co., I have to advise you that the matter has been referred to the military government of the Philippine Islands and will receive the personal attention of Governor Taft on his return to Manila. While Governor Taft was in Washington, the representatives of the railway co. were given a hearing before Judge Taft and me, the outcome of which was a substantial agreement that the position taken in my report, to which you refer, is correct, and that the matter should be dealt with as a business proposition between business men, rather than as a legal proposition controlled by hard and fast rules of law. It was further considered that inasmuch as the railway company desired certain concessions to enable them to extend their railway and as the government of the Philippines desired such extension to be made, the matter could and would be disposed of in the negotiations and proceedings relating to the new concession." (Mr. Magoon, Law Officer, Bureau of Insular Affairs, to Mr. Moore, Aug. 9, 1902, MS.)

Oct. 10, 1898, the British ambassador at Washington inclosed to the Department of State a copy of the concession granted  
Cable concessions. by the Spanish Government to the Cuba Submarine Telegraph Company.<sup>a</sup>

Jan. 18, 1899, he addressed to the Department of State another note, concerning the concessions granted by Spain in the Philippines to the Eastern Extension Australasia and China Telegraph Company.<sup>b</sup>

Accompanying this note there was the following pro memoria:

"The undersigned has been instructed by his Government to make the following representation in relation to the claims of the Eastern Extension Telegraph Company in relation to exclusive rights and to subsidy under their concessions from Spain in the Philippine Islands, which the company fear may not be fully recognized by the United States Government.

"The obligations contracted by Spain under those concessions are of a local nature and it will not be contested, as Her Majesty's Government believe, that they become binding on the United States Government on their taking possession of the islands or assuming effective control of them, whether under a formal protectorate or otherwise. On the faith of those concessions the company has expended vast sums for the benefit of the islands, and the obligations in question clearly belong to that class of local obligations which have always been held to be transferred with the sovereignty and to pass with the territory.

<sup>a</sup>Sir J. Pouncefote, Brit. amb., to Mr. Hay, Sec. of State, Oct. 10, 1898, MS. Notes from British Leg.

<sup>b</sup>Sir J. Pouncefote, Brit. amb., to Mr. Hay, Sec. of State, Jan. 18, 1899, MS. Notes from Brit. Leg.



"The question is really governed by general principles of international law as to the effect of conquest, and therefore Her Majesty's Government do not contend that the use by the United States Government of the company's cable, without availing themselves of the Government rights reserved by the concessions (such as those of free telegrams, etc.), would of itself render the concessions binding on them. But the use of the cable by the United States Government may fairly be mentioned as illustrating the local nature of obligations and as strengthening the claim put forward by the company, and which Her Majesty's Government consider to be well founded.

"Although Her Majesty's Government trust that there is no real ground for the apprehensions of the company, the undersigned is desirous to make this representation to the United States Government on the subject."

The ambassador's note and the enclosed pro memoria were communicated to the Attorney-General for his consideration.<sup>a</sup>

Feb. 14, 1899, the ambassador, referring to his previous communications, expressed the hope that he might be able to report to his Government "an assurance that the rights of the two companies under their respective concessions will be fully recognized, and that the obligations of Spain thereunder will be duly assumed and carried out by the United States Government during their occupation of the territories in question."<sup>b</sup>

The Attorney-General, March 17, 1899, rendered an opinion to the effect that, as to Cuba, the United States, while not free from responsibility with regard to the affairs of the island, was under no duty to assume "all the executory and other contracts which may belong to the past Government or its successor," but should limit its action to things consistent with the functions of a temporary occupant, arranging for the succession of the government of Cuba, whenever it should be established. As to the concessions in the Philippines, he found himself unable to express an opinion, owing to lack of information as to their terms.<sup>c</sup>

The Attorney-General subsequently advised the Secretary of War as follows: "I do not think that controversies as to grants and franchises derived from Spain, but exercisable within the island of Cuba or other islands derived by the United States from Spain, ought to be precipitated to a decision in the present unsettled condition that prevails in those islands. It is better to preserve, in all cases of doubt and difficulty, the present status until the full restoration of the civil

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<sup>a</sup> Mr. Hay, Sec. of State, to Sir J. Pauncefote, Brit. amb., Jan. 19, 1899, MS. Notes to Brit. Leg. XXIV. 424.

<sup>b</sup> Sir J. Pauncefote, Br. amb., to Mr. Hay, Sec. of State, Feb. 14, 1899, MS. Notes from Brit. Leg.

<sup>c</sup> Griggs, At.-Gen., March 17, 1899, 22 Op. 384; Mr. Hay, Sec. of State, to Sir J. Pauncefote, Brit. amb., March 27, 1899, MS. Notes to Brit. Leg. XXIV. 482.

régime and the establishment of permanent governments, under which the rights of all can be duly and deliberately determined.”<sup>a</sup>

In July, 1901, the rights of the various cable companies in Cuba became the subject of a comprehensive report by the law officer of the Division of Insular Affairs of the War Department. In this report the phrase “present status,” employed by the Attorney-General, was interpreted as meaning the *status quo ante bellum*; and orders were issued accordingly to the military governor of Cuba.<sup>b</sup>

A report was also made by the same official upon the claim of the Eastern Extension Telegraph Company for the payment by the United States of a subsidy, which Spain had by the terms of the concession agreed to pay. In this report, which quoted from the report of the Transvaal Concessions Commission of April 19, 1901, it was advised that the question of the subsidy should be treated “as though it was an original application made by a company contemplating the construction of a *quasi* public improvement.”<sup>c</sup>

An application was made by the Commercial Cable Company to the Secretary of War for permission to land a submarine cable in Cuba and Porto Rico, for the purpose of effecting cable communication between those islands and the United States. By an executive order, promulgated by the commanding general of the United States forces in Cuba, all grants and concessions of franchises were forbidden to be made by any authority in the island, except upon the approval of the Secretary of War; and by an act of Congress of March 3, 1899, it was directed that no property, franchises, or concessions of any kind should be granted by the United States, or by any military or other authority, in Cuba during the occupation of the island by the United States. The Attorney-General therefore advised that it would be inexpedient to grant the application to land the cable in Cuba, and that, as the permission to land it in Porto Rico seemed to depend upon the grant of a similar right as to Cuba, the same order should be made with reference to that part of the application, although the circumstances under which the United States held and governed the two

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<sup>a</sup> Griggs, At.-Gen., June 15, 1899, 22 Op. 514, 519.

<sup>b</sup> Report of Mr. Magoon, law officer, Division of Insular Affairs, War Department, July 9, 1901, Magoon's Reports, 281-302. See, also, Magoon's Reports, 511, 534, 571, 579.

<sup>c</sup> Report of Mr. Magoon, law officer, Division of Insular Affairs, War Department, July 22, 1901, Magoon's Reports, 529, 531. It appears, according to facts subsequently disclosed, that the company had suffered no actual loss or injury; that its business had so increased that it was making the percentage guaranteed by Spain, and that, if the United States had been substituted for Spain in the concession, the company would have been obliged to refund a considerable amount in excess of any claim which it might have made, by reason of the preferential rate to which the United States would have been entitled. (Mr. Magoon to Mr. Moore, Aug. 9, 1902, MS.)

islands were materially different. In conclusion, he said: "The conclusion which I have arrived at renders it unnecessary for me to discuss or decide the objections raised on behalf of the Western Union Telegraph Company, lessee of the International Cable Company of New York, which companies claim an exclusive grant under a concession from Spain made in 1867, which exclusive grant, it is claimed, has not yet expired."

In conformity with this opinion, the application of the Commercial Cable Company was denied, and afterwards, on May 27, 1899, an order was made by the War Department directing General Brooke, then commanding the American forces in Cuba, to prevent the company from landing a cable in the island. Of this order the company asked for a reconsideration, and the question was again referred to the Attorney-General. The Attorney-General advised the Secretary of War that if the company should, in disregard of the instructions of his Department, carry out its proclaimed purpose to land the cable in Cuba, he would be justified in using such force as might be necessary to remove and disrupt it. Having thus pronounced an opinion upon the question of power, the Attorney-General proceeded to discuss the question of "the private rights and public duties" involved in the subject. In this relation he said:

"This Department has not assumed to pass upon the validity of the exclusive right which the Western Union Telegraph Company and its leased companies claim. They have formally notified the authorities of the United States of their claim under a concession granted by Spain, alleged to continue for forty years and not yet expired. The mere fact that the Western Union Company is enjoying, under a grant of exclusive right, what amounts to a monopoly is no reason of itself why it should be deprived of its concession. . . . The laying and operation of cables, especially a quarter of a century ago, were attended with great expense and risk, and it was a very common thing for different nations, including the United States, to grant exclusive concessions for a term of years to companies that would undertake to invest the necessary capital and carry on such enterprises. . . . Concessions of this kind, which carry with them exclusive rights for a period of years, constitute property of which the concessionary can no more be deprived arbitrarily and without lawful reason than it can be deprived of its personal tangible assets. In a case in the Supreme Court of the United States (1 Wall. 352) Mr. Justice Field said:

"The United States have desired to act as a great nation, not seeking, in extending their authority over the ceded country, to enforce forfeitures, but to afford protection and security to all just rights which could have been claimed from the government they superseded."

"If, therefore, the Western Union Telegraph Company has an exclusive grant applicable to Cuba for cable rights, which grant has not expired, it would be violative of all principles of justice to destroy its exclusive right by granting competing privileges to another company.

"It is suggested . . . that the grant which the Western Union Telegraph Company now holds, by lease or assignment, was obtained by fraud practiced on the Government of Spain, and that for that reason its grant is void. Such an allegation can not be tried upon a proceeding like this. Neither the War Department nor the Department of Justice has power to summon witnesses or to give a judgment upon this question. It is essentially a question for judicial examination and decision. . . . Vested rights which are property ought not to be taken from anyone, even upon charges of fraud, except by due process of law. Executive action by the War Department applied to subjects like this is not due process of law.

"Mr. Mackay [president of the Commercial Cable Company] further submits that 'the tremendous power of the Government should not be exercised against us.' It is the function of the Government to prevent, so far as possible, all infringement of the vested rights of others. Mr. Mackay, through his company, proposes to set up a competitive cable line, which he concedes will greatly injure the business of the Western Union Company; and although the latter company produces a grant which, on its face, gives it an exclusive right for a period which has not expired, he requests this Government to stand idly by while he does, with the acquiescence of the United States, the very thing which the Government of Spain, our predecessor in the sovereignty of Cuba, solemnly agreed not to do or permit to be done.

"I do not think that controversies as to grants and franchises derived from Spain, but exercisable within the island of Cuba or other islands derived by the United States from Spain, ought to be precipitated to a decision in the present unsettled condition that prevails in those islands. It is better to preserve, in all cases of doubt and difficulty, the present status until the full restoration of the civil régime and the establishment of permanent governments under which the rights of all can be duly and deliberately determined."

Griggs, At.-Gen., opinions of March 25, 1899, and June 15, 1899, 22 Op. 408, 514. See, also, 23 Op. 195, 451.

For resolutions of various commercial bodies, calling for additional cable service to Cuba, see S. Doc. 289, 56 Cong. 1 sess.

In 1889-1893 certain concessions were granted by Sigcau, then ruler of Pondoland, of railway, mineral, land, and trading rights in that country. In 1894, Pondoland was formally annexed to the British dominions, but, while Sigcau gave notice of his desire that the concessions should be ratified, no such condition was attached to the annexation. Subsequently, the conces-

sionaire sued the premier of Cape Colony, under the Crown Liabilities Act, 1888, for a formal recognition of his rights; and the colonial court having decided against him, he appealed to the Privy Council in England. It appeared that he had never obtained possession of the lands or exercised his concessionary rights, beyond, perhaps, an effort to find graphite. The Lord Chancellor (Earl of Halsbury), delivering the judgment of their lordships, found that the act of 1888 did not authorize the making of a declaration of right as against the Crown. But there was, he added, a "more complete answer" to any claim arising from the concessions, and this was that the annexation was an act of state—a transaction between sovereigns—and as such was "governed by other laws than those which municipal courts administer." If there was either an express or a well-understood bargain that private property in the ceded territory should be respected, it was one that could be enforced only "by sovereign against sovereign, in the ordinary course of diplomatic pressure." In reality there was no bargain that the concessions should be recognized; but their lordships were not prepared to differ from the observation of the court below that the concessionaire had "strong claims to the favorable condition of the Government and Parliament of the country."

*Cook v. Sprigg* (1899), 68 L. J. P. C., 144, (1899) App. Cas. 572, 81 Law T. (N. S.) 281, following *Sec. of State for India v. Kamachee Boye Sahaba*, 13 Moore P. C. 22, and citing *Doss v. Sec. of State for India*, L. R. 19 Eq. 509, 534.

**Transvaal Concessions Commission.** "7. It is desirable to state here the broad principles which we considered applicable to the problem before us.

"8. On the 1st September, 1900, Her late Majesty annexed the territories and obliterated the sovereignty of the South African Republic. It has, therefore, become necessary that the new Government should decide in what relation it stands to the concessions granted by the Government of the late Republic, and upon this point we submit the following observations:

"9. It is clear that a state which has annexed another is not legally bound by any contracts made by the state which has ceased to exist, and that no court of law has jurisdiction to enforce such contracts if the annexing state refuse to recognize them.<sup>a</sup> But the modern usage of nations has tended in the direction of the acknowledgment of such contracts. After annexation, it has been said, the people change their allegiance, but their relations to each other and their rights of property remain undisturbed,<sup>b</sup> and property includes those rights which lie in contract.<sup>c</sup> 'La conquête change les droits politiques des habitants du

<sup>a</sup>*Cook v. Sprigg*. Law Reports 1899. Appeal Cases, 572.

<sup>b</sup>*U. S. v. Percheman*. 7 Peters, American Rep. Opinion of Chief Justice Marshall, p. 86, § 7.

<sup>c</sup>*Soulard v. U. S.* 4 Peters, American Rep., p. 512.

territoire, et transfere au nouveau souverain la propriété du domaine public de son cedant. Il n'en est pas de même de la propriété privé qui demeure incommutable entres les mains de ses legitimes possesseurs.'<sup>a</sup> Concessions of the nature of those which were the subject of our enquiry presented examples of mixed public and private rights: they probably continue to exist after annexation until abrogated by the annexing state,<sup>b</sup> and, as matter of practice in modern times, where treaties have been made on the cession of territory, have been often maintained by agreement.<sup>c</sup> In considering what the attitude of a conqueror should be towards such concessions we are unable to perceive any sound distinction between a case where a state acquires part of another by cession, and a case where it acquires the whole by annexation. The opinion that in general private rights should be respected by the conqueror, though illustrated and supported by jurists by analogies drawn from the Roman law of inheritance, is based on the principle, which is one of ethics rather than of law, that the area of war and of suffering should be, so far as possible, narrowly confined, and that non-combatants should not, where it is avoidable, be disturbed in their business; and this principle is at least as applicable to a case where all as where some of the provinces of a state are annexed.

"10. Though we doubt whether the duties of an annexing State towards those claiming under concession or contracts granted or made by the annexed State have been defined with such precision in authoritative statement, or acted upon with such uniformity in civilized practice as to warrant their being termed rules of international law, we are convinced that the best modern opinion favors the view that, as a general rule, the obligations of the annexed State towards private persons should be respected. Manifestly the general rule must be subject to qualification, *e. g.*, an insolvent State could not by aggression, which practically left to a solvent State no other course but to annex it, convert its worthless into valuable obligations; again, an annexing State would be justified in refusing to recognize obligations incurred by the annexed State for the immediate purposes of war against itself; and probably no State would acknowledge private rights, the existence of which caused, or contributed to cause, the war which resulted in annexation.

"11. Subject to these reservations His Majesty's Government in dealing with the concessions in question will probably be willing to adopt the principle which, in the case of the annexation of Hanover by Prussia (the modern case most nearly corresponding with that under consideration), was proclaimed by the conquerors in the follow-

<sup>a</sup>Calvo. *Le Droit International*, 2478. Halleck. *Interna. Law*, p. 831.

<sup>b</sup>Prussia and Netherlands, 1816. Peace of Zurich, 1859. France and Sardinia, 1860. Peace of Vienna, 1864. Cession of Venetia, 1866. Germany and France, 1871. Great Britain and Germany, 1890.

<sup>c</sup>Huber, *Staaten Succession*, p. 149. Martens *Nouveau Recueil*.

ing terms: 'We will protect everyone in the possession and enjoyment of his duly acquired rights.' (Royal Prussian Patent, 3rd Oct., 1866.)

"12. The acceptance of this principle clearly renders it necessary that the annexing government should in each case examine whether the rights which it is asked to recognize have, in fact, been duly acquired. It is an obvious corollary that the rights in question must be valid not only by reason of due acquisition in the first instance, but by reason of their conditions having been subsequently duly performed.

"13. Applying these principles more in detail to the case of the concessions with which we have had to deal, we have come to the conclusion that the cancellation of a concession may properly be advised when

"(i) The grant or the concession was not within the legal powers of the late government; or,

"(ii) Was in breach of a treaty with the annexing State; or,

"(iii) When the person seeking to maintain the concession acquired it unlawfully or by fraud; or

"(iv) Has failed to fulfill its essential conditions without lawful excuse.

"In any case, falling within these categories, where there has either been no 'duly acquired' right, or there has been a nonfulfillment of essential conditions by the concessionaire, cancellation or modification without compensation appears to us, in the absence of special circumstances, to be justifiable.

"14. We further think that the new government is justified in cancelling or modifying a concession when

"(v) The maintenance of the concession is injurious to the public interest.

"15. In this last case, however, the question of compensation arises, inasmuch as it would be inequitable that a concessionaire should lose without compensation a right duly acquired, and whose conditions he had duly fulfilled, because the new government differed from the old in its view as to what was, or was not, injurious to public interest even though the opinion of the new government were obviously the true one. We do not consider the actual amount of compensation payable as a matter within the scope of our inquiry, but we submit the following observation as to the principles relevant to the question:

"In determining the amount of compensation in respect of losses sustained by the owner of a concession cancelled or modified as injurious to the public interest, regard may justly be paid to the question whether the owner, at the time when he received or acquired the concession, knew, or reasonably ought to have known, that it was precarious. A concession may be precarious for many reasons, but it certainly is so if the subject-matter of it is closely related to large and changing public interests. In such matters, no reasonable man can anticipate that a government can indefinitely fetter the legislation

of the future; and indeed, in countries such as Great Britain, where opinion is tender to vested interests, modification without compensation has been made in the statutory powers and privileges of undertakings incorporated under Parliamentary powers and relating to gas, water, electric light, public transport, and other subjects with which the well-being of the community at large is closely bound up.

“16. We submit also that no concessionaire can rightly claim to be placed in a better position under the new than under the old government, and therefore in assessing compensation to any owner of a concession in respect of his loss the value of his interest should be taken as it was before the war which has resulted in annexation, and before the superior credit and stability of the annexing State have appreciated his property.

“17. On the other hand, when public interest requires the modification or cancellation of a justly acquired concession, due consideration ought properly to be shown in cases where new, and under the circumstances, hazardous enterprises have been pioneered into stability in an unsettled and undeveloped country where profit was uncertain, and total loss a possible contingency.”

Report of the Hon. Alfred Lyttelton, K. C., M. P.; A. M. Ashmore, C. M. G., and R. Kelsey Loveday, esq., Transvaal Concession Commission, April 19, 1901, Blue Book, South Africa, June, 1901 (Cd. 623), 6-8.

## 8. ON PRIVATE RIGHTS.

### § 99.

By the treaty by which Louisiana was ceded to the United States, it was provided (Art. III.) that the inhabitants should be “maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.”

Stipulations for the protection of rights of property may also be found in other treaties by which the United States has acquired title to territory. They are held by the courts to be merely declaratory of the law of nations.

As to property of the Orthodox Greek Church in Alaska, under Art. II. of the treaty of cession, see Mr. Day, Assist. Sec. of State, to the Sec. of the Interior, Sept. 27, 1897, 221 MS. Dom. Let. 205, enclosing copy of a letter of Bishop Nicolas to the Russian minister at Washington, Aug. 9, 1897, left at the Department of State Sept. 23, 1897; Mr. Sherman, Sec. of State, to the Sec. of the Interior, Jan. 21, 1898, enclosing copy of a note from the Russian chargé of Jan. 15, 1898.

“If, also, a conquered country is *ceded*, the old possessors are entitled to their estates; and when any country is *conquered*, the possessors are not deprived of their estates, but only change their masters.”

**Judicial decisions.**

Wilcox v. Henry (1782), supreme court of Pennsylvania, 1 Dallas, 89.



"In the treaty by which Louisiana was acquired, the United States stipulated that the inhabitants of the ceded territory should be protected in the free enjoyment of their property. The United States, as a just nation, regard this stipulation as the avowal of a principle which would have been held equally sacred, though it had not been inserted in the contract.

"The term 'property,' as applied to lands, comprehends every species of title inchoate or complete. It is supposed to embrace those rights which lie in contract; those which are executory; as well as those which are executed. In this respect the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away."

Marshall, C. J., *United States v. Soulard* (1830), 4 Pet. 511, quoted in *Smith v. United States* (1836), 10 Pet. 326; S. P., *United States v. Kingsley*, 12 Pet. 476. This rule, however, does not extend to mere inchoate rights which are of imperfect obligation and affect only the conscience of the new sovereign. (*Dent v. Emmeger*, 14 Wall. 308.) A mere change of sovereignty produces no change in the state of rights existing in the soil. (*Mutual Ass. Society v. Watts' Ex'r* (1816), 1 Wheaton, 279, relating to a lien on real property in a part of the District of Columbia after its cession to the United States.)

It was held that grants of land made by the Spanish authorities in Louisiana after its cession to France and before its cession by the latter to the United States, were void (*United States v. Reynes*, 9 How. 127; *Davis v. Concordia*, id. 280); and that grants made by the French authorities in Louisiana after the treaty of Fontainebleau, were void unless continued possession laid a foundation for presuming a confirmation by the authorities of Spain. (*United States v. Pillerin*, 13 How. 9.)

The 8th article of the treaty of cession of the Floridas to the United States providing, according to the English text, that grant of land made in the ceded territory by Spain prior to Jan. 24, 1818, "shall be ratified and affirmed," it was at first held that this was the "language of contract," and that, till Congress had legislated on the subject, the stipulations of the treaty in this respect were inoperative. Subsequently this view of the article was overruled, on the strength of the Spanish text, which read that the grants should 'remain ratified and confirmed'—"thus conforming," declared the court, "exactly to the universally received doctrine of the law of nations." There could be no motive for the interposition of the government "in order to give validity to titles which, according to the usages of the civilized world, were already valid."

*United States v. Percheman* (1833), 7 Pet. 51, overruling on this point *Foster v. Neilson* (1829), 2 Pet. 253. See, also, *United States v. Arredondo*, 6 Pet. 691; *United States v. Clarke*, 8 Pet. 436; *United States v. Clarke*, 16 Pet. 231, 232.

The protection of the treaty extended to conditional as well as absolute concessions. (*United States v. Clarke*, 9 Pet. 168; *Mitchel v. United States*,

id. 734.) But if the condition without good reason remained unperformed, no title vested. (*United States v. Percheman*, 7 Pet. 51; *United States v. Clarke*, 9 Pet. 168; *United States v. Mills*, 12 Pet. 215.)

A Spanish grant made after Dec. 2, 1820, was void. (2 Op. 191, Wirt, 1829. See, also, *United States v. Clarke*, 8 Pet. 436.) So were unlocated and indefinite grants. (*O'Hara v. United States*, 15 Pet. 275; *United States v. Delespine*, id. 319; *United States v. Miranda*, 16 id. 153.) An equitable Spanish title, not confirmed by the United States, could not prevail against a legal title acquired from the United States. (*United States v. King*, 3 How. 773.)

The authorities of Spain had power to make grants of the public domain in Florida in accordance with their own ideas of the merits of the grantee, and the court can only consider the questions whether a grant was made and what was its legal effect.

*United States v. Hanson*, 16 Pet. 196; *United States v. Acosta*, 1 How. 24.

Grants of land in Florida made by the King of Spain to the Roman Catholic Church before the cession of that territory to the United States were valid, and were confirmed by the treaty of cession.

Wirt, At.-Gen. (1822), 1 Op. 563.

"It is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property remain undisturbed. . . .

"This article [Art. VIII. of the treaty of 1819 with Spain, ceding the Floridas] is apparently introduced on the part of Spain, and must be intended to stipulate expressly for that security to private property which the laws and usages of nations would, without express stipulation, have conferred. . . . Without it the titles of individuals remain as valid under the new government as they would under the old; and those titles, so far at least as they were consummate, might be asserted in the courts of the United States, independently of this article."

Marshall, C. J., *United States v. Percheman* (1833), 7 Pet. 51, 86, 87.

Substantially the same language is used by Marshall, C. J., in *Delassus v. United States* (1835), 9 Pet. 117, 133, where he says: "No principle is better settled in this country than that an inchoate title to lands is property." *S. P., Mitchell v. United States* (1835), 9 Pet. 711.

"A grant or a concession made by that officer who is by law authorized to make it, carries with it prima facie evidence that it is within

his power. . . . He who alleges that an officer intrusted with an important duty has violated his instructions, must show it. This subject was fully discussed in the *United States v. Arredondo*, 6 Peters, 691; *Percheman v. United States*, 7 Peters, 51; *United States v. Clarke*, 8 Peters, 436."

*Marshall, C. J., Delassus v. United States* (1835), 9 Pet. 134.

The act of Congress of June 22, 1860, had for its object the final adjustment of land claims and the validation of grants of land made by the Spanish Government to bona fide grantees within the disputed territory while that Government remained in possession of it. (*United States v. Lynde*, 11 Wall. 632.)

Where grants of land in Florida were in fact complete prior to the ratification of the treaty of cession, Congress might require their genuineness and extent to be established by proper proceedings before they could be held valid. (*Florida v. Furman* (1901), 180 U. S. 402.)

A grant of lands in California, while it was a Mexican province, made by the chief of an administration, during an intestine war, when he was in flight from the seat of government, and his cause, soon afterwards completely overthrown, in extremity, can not be sustained, its validity never having been acknowledged by the grantor's successors, and no sanction ever having been given it by the United States.

*United States v. Sutter*, 21 Howard, 170; *United States v. Rose*, 23 id. 262.

The fact that Mexico declared through her commissioners who negotiated the treaty of Guadalupe Hidalgo that no grants of land were issued by the Mexican governors of California after May 13, 1846, does not affect grants actually made after that date by those governors, while their authority and jurisdiction continued.

*United States v. Yorba*, 1 Wallace, 412. See, also, *More v. Steinbach*, 127 U. S. 70.

The treaty of Guadalupe Hidalgo, between the United States and Mexico, did not divest the pueblo, existing at the site of the city of San Francisco, of any rights of property, or alter the character of the interests it may have held in any lands under the former government. It makes no distinction in the protection it provides between the property of individuals and that held by towns under the Mexican Government.

*Townsend v. Grectley*, 5 Wallace, 326.

"The United States have never sought by their legislation to evade the obligation devolved upon them by the treaty of Guadalupe Hidalgo to protect the rights of property of the inhabitants of the ceded territory, or to discharge it in a narrow and illiberal manner. They have directed their tribunals, in passing upon the rights of the inhabitants, to be governed by the stipulations of the treaty, the law of nations,

the laws, usages, and customs of the former government, the principles of equity, and the decisions of the Supreme Court so far as they are applicable. They have not desired the tribunals to conduct their investigations as if the rights of the inhabitants to the property which they claim depended upon the nicest observance of every legal formality. They have desired to act as a great nation, not seeking, in extending their authority over the ceded country, to enforce forfeitures, but to afford protection and security to all just rights which could have been claimed from the government they superseded."

Field, J., *United States v. Anguisola* (1863), 1 Wall. 352. S. P., *United States v. Moreno* (1863), 1 Wall. 400; *Strother v. Lucas*, 12 Pet. 412; *United States v. Roselius*, 15 How. 36; *Lietensdorfer v. Webb*, 20 How. 176; *United States v. Peralta*, 3 Wall. 434; *Beley v. Naphtaly*, 169 U. S. 353; *United States v. Olvera*, 154 U. S. 538. As to the three kinds of Mexican grants, see *United States v. McLaughlin*, 127 U. S. 428, 448. See also 175 U. S. 76, 248, 500, 509, 552.

The division of a country and the maintenance of independent governments over its different parts do not of themselves divest the rights which the citizens of either have to property situate within the territory of the other. A Mexican was not, by the revolution which resulted in the independence of Texas, or by her constitution of March 17, 1836, or her laws subsequently enacted, divested of his title to lands in that State, but he retained the right to alienate and transmit them to his heirs, and the latter are entitled to sue for and recover them.

*Airhart v. Massieu*, 98 U. S. 491; S. P., *Jones v. McMasters*, 20 How. 8.

A suit was brought by the heirs of the Chevalier de Repentigny to recover certain lands at the Sault de Ste. Marie, which were granted to him by the French Government in 1751. It appeared that, after the grant was made, he took possession of the land, but that subsequently, in 1754, after the war between France and Great Britain broke out, being called into the active service of France, he left it. He never returned to it. On the contrary, he continued in the service of France and became a major-general in the army and governor of Senegal. By the treaty of 1763, which surrendered Canada to Great Britain, it was provided that French subjects might retire and sell their estates, provided it be to British subjects, and transport their effects as well as their persons within a certain time. The court, Mr. Justice Nelson delivering the opinion, said (1) that the rule as to protection of private rights in case of conquest was limited to the inhabitants who remained and became subjects of the victorious sovereign; and (2) that the conqueror had the right to forbid the departure of his new subjects and exercise his sovereignty over them. "Now, in view of these principles," said the court, "it is apparent that Repentigny, having refused to continue an inhabitant of Canada and to

become a subject of Great Britain, but, on the contrary, elected to adhere in his allegiance to his native sovereign, and to continue in his service, deprived himself of any protection or security of his property, except so far as it was secured by the treaty. That protection . . . was limited to the privilege of sale or sales to British subjects, and to carry with him his effects, at any time within eighteen months from its ratification. Whatever property was left unsold was abandoned to the conqueror."

U. S. *r. Repentigny* (1866), 5 Wall. 211. Cited in Hall, *Int. Law*, 4th ed., 593, 594.

Grants of contested territory made *flagrante bello* by the party who fails can derive validity only from treaty stipulations. (*Harcourt v. Gaillard*, 12 Wheat. 523.)

"It is no doubt the received doctrine that, in cases of ceded or conquered territory, the rights of private property in lands are respected. Grants made by the former government, being rightful when made, are not usually disturbed. . . . It is true that the property rights of the people, in those cases, were protected by stipulations in the treaties of cession, as is usual in such treaties; but the court took broader ground, and held, as a general principle of international law, that a mere cession of territory only operates upon the sovereignty and jurisdiction, including the right to the public domain, and not upon the private property of individuals which had been segregated from the public domain before the cession. This principle is asserted in the cases of *United States v. Arredondo*, 6 Pet. 691; *United States v. Percheman*, 7 Pet. 51, 86-89; *Delassus v. United States*, 9 Pet. 117; *Strother v. Lucas*, 12 Pet. 410, 428; *Doe v. Eslava*, 9 How. 421; *Jones v. McMasters*, 20 How. 8, 17; and *Leitensdorfer v. Webb*, 20 How. 176."

*Coffee v. Groover* (1887), 123 U. S. 1, 9-10.

S. P., *United States v. Chaves* (1895), 159 U. S. 452, 457, citing *United States v. Percheman*, 7 Pet. 51, 86.

By an act of March 3, 1891, 26 Stat. 854, Congress created a court of Private Land Claims for the settlement of land titles in New Mexico and Arizona. This act prohibited the allowance of any claim "that shall not appear to be upon a title lawfully and regularly derived from the Government of Spain or Mexico, or from any of the States of the Republic of Mexico having lawful authority to make grants of land." Under this provision the court must be satisfied, not merely of the regularity in the form of the proceedings, but also of the authority of the official making the grant, or, if the grant was unwarranted, of its having been afterwards lawfully ratified.

*Hayes v. United States* (1898), 170 U. S. 637, comparing the act of March 3, 1891, with the legislation in *Arredondo's case*, 6 Pet. 691, and *Peralta's case*, 19 How. 343; *Berreyesa v. United States*, 154 U. S. 623; *United States v. Coe*, 170 U. S. 681; *Ainsa v. United States*, 161 U. S. 208; *Ely's Adm.*

*v. United States*, 171 U. S. 220, 224; *Faxon v. United States*, 171 U. S. 244, 249; *Bergere v. United States*, 168 U. S. 66; *Chaves v. United States*, 168 U. S. 177; *United States v. Ortiz* (1900), 176 U. S. 422; *United States v. Elder*, 177 U. S. 104; *Whitney v. United States* (1901), 181 U. S. 104; *Cessna v. United States*, 169 U. S. 165.

An inchoate claim is not within the act of March 3, 1891, but the duty of protecting such imperfect rights of property rests upon the political department of the Government. (*United States v. Santa Fé*, 165 U. S. 675; *United States v. Sandoval*, 167 U. S. 278; *Zia, Pueblo of v. United States*, 168 U. S. 198.)

Possession of land, after the treaty of Guadalupe Hidalgo, though exclusive and notorious, can not contribute to create a title; but proof of adverse, exclusive, and uninterrupted possession, before the treaty, may warrant a presumption of a grant. (*Crespin v. United States*, 168 U. S. 208; *United States v. Chaves*, 159 U. S. 452.)

As to the powers of the ayuntamiento of El Paso to make a grant, see *Cessna v. United States*, 169 U. S. 165.

The significance of an *empresario* grant is discussed in *Interstate Land Co. v. Maxwell Land Grant Co.*, 139 U. S. 569.

In a grant of certain lands in 1844 to the pueblo and natives of Tumacácori, it was declared that the lands were in no case to be alienated, "since they are all to be considered as belonging to the Republic and community of natives alone, for their proper use, as well for sowing purposes as for stock raising and the increased prosperity of the same." "This was in accordance with the general rule that the missionaries and Indians only acquired a usufruct or occupancy at the will of the sovereign. *United States v. Cervantes*, 18 How. 553." (*Faxon v. United States*, 171 U. S. 244, 258-259.)

"It was undoubtedly the duty of Congress, as it was its purpose in the various statutory enactments it has made in respect to Mexican titles, to recognize and establish every title and right which before the cession Mexico recognized as good and valid. In other words, in harmony with the rules of international law, as well as with the terms of the treaties of cession, the change of sovereignty should work no change in respect to rights and titles; that which was good before should be good after; that which the law would enforce before should be enforceable after the cession." The duty of determining what titles were good and valid before the cession has as a rule been committed by Congress to some judicial tribunal.

*Ely's Adm. v. United States* (1898), 171 U. S. 220, 223. At pp. 233-234 of this case the court said:

"While of course time does not run against the government, and no prescription, perhaps, may be affirmed in favor of the validity of this grant, yet the inaction of the government during these many years is very persuasive, not merely that it considered that the intendant had the power to make the sale, but that in fact he did have such power."

While the United States was bound to respect the rights of private property in the territory ceded by the treaty of Guadalupe Hidalgo, yet it had the right to prescribe reasonable means for determining the validity of titles to land within the ceded territory, and to require all

persons having such claims to present them for recognition, and to treat as abandoned all claims not thus presented.

*Barker v. Harvey* (1901), 181 U. S. 481.

Injunction will lie to restrain intrusion on lands granted by Russia in fee simple prior to the treaty of cession of 1867, by which the United States agreed to protect the inhabitants in their rights of property.

*Callsen v. Hope*, 75 Fed. Rep. 758.

“But the decision now made rests on an alleged rule of international law which, assumed, as it now is, by the Government of Chili, becomes a proper matter of discussion between ourselves and that Government. It is asserted by the Government of Chili (for, in international relations, and the maintenance of international duties, the action of the judiciary in Chili is to be treated, when assumed by the Government, as the act of the Government) that a sovereign, when occupying a conquered territory, has, by international law, the right to test titles acquired under his predecessor by applying to them his own municipal law, and not the municipal law of his predecessor under which they vested. The true principle, however, is expressed in the following passage cited in the memorialist's brief:

“‘But the right of conquest cannot affect the property of private persons; war being only a relation of state to state, it follows that one of the belligerents who makes conquests in the territory of the other cannot acquire more rights than the one for whom he is substituted; and that thus, as the invaded or conquered state did not possess any right over private property, so also the invader or conqueror cannot legitimately exercise any right over that property. Such is to-day the public law of Europe, whose nations have corrected the barbarism of ancient practices which place private as well as public property under military law.’ [C. Massé, *Rapports du droit des gens avec le droit civil*. Vol. I., p. 123, § 148-149.]

“This doctrine has frequently been acted on in the United States. Thus it has been held by the Supreme Court that when New Mexico was conquered by the United States, it was only the allegiance of the people that was changed; their relation to each other, and their rights of property remained undisturbed. [*Leitensdorfer v. Webb*, 20 How. 176.]

“The same has been held as to California. The rights acquired under the prior Mexican and Spanish law, so it was decided, were ‘consecrated by the law of nations.’ [U. S. *v. Moreno*, 1 Wall. 400. See U. S. *v. Auguisola*, 1 Wall. 352; *Townsend v. Greeley*, 5 Wall. 326; *Dent v. Emmeger*, 14 Wall. 308; *Airhart v. Massieu*, 98 U. S. 491; *Mutual Assurance Society v. Watts*, 1 Wheat. 279; *Delassus v. U. S.*, 9 Peters,

117; *Mitchel v. U. S.*, 9 Peters, 711; *Strother v. Lucas*, 12 Peters, 410; *U. S. v. Repentigny*, 5 Wall. 211.]

“The Government of the United States, therefore, holds that titles derived from a duly constituted prior foreign government to which it has succeeded are ‘consecrated by the law of nations’ even as against titles claimed under its own subsequent laws. The rights of a resident neutral—having become fixed and vested by the law of the country—cannot be denied or injuriously affected by a change in the sovereignty or public control of that country by transfer to another government. His remedies may be affected by the change of sovereignty, but his *rights* at the time of the change must be measured and determined by the law under which he acquired them. . . . The Government of the United States is therefore prepared to insist on the continued validity of such titles, as held by citizens of the United States, when attacked by foreign governments succeeding that by which they [were] granted. Title to land and landed improvements, is, by the law of nations, a continuous right, not subject to be divested by any retroactive legislation of new governments taking the place of that by which such title was lawfully granted. Of course it is not intended here to deny the prerogative of a conqueror to confiscate for political offenses, or to withdraw franchises which by the law of nations can be withdrawn by governments for the time being. Such prerogatives have been conceded by the United States as well as by other members of the family of nations by which international law is constituted. What, however, is here denied is the right of any government to declare titles lawfully granted by its predecessor to be vacated because they could not have been lawfully granted if its own law had, at the time in question, prevailed. This pretension strikes at that principle of historical municipal continuity of governments which is at the basis of international law.”

Mr. Bayard, Sec. of State, to Mr. Roberts, Mar. 20, 1886, MS. Inst. Chili. XVII. 196, 200.

“My recent instructions to you show the deep concern which this Government feels in the reported operations of Germany in the Samoan Islands, with which we have treaty relations. We have no treaty relations with the Marshall or Gilbert groups. They are understood to belong to the large category of hitherto unclaimed islands which have been under no asserted administration, and where the traders of various nationalities have obtained lodgment through good relations with the natives. Of the Gilbert Islands we have no precise information. Mr. von Alvensleben recently stated in conversation that the German claim to the Caroline Islands having been decided adversely, Germany would, instead, take possession of the Marshall group. It is understood, but informally so, that an arrangement exists between Great Britain and Germany whereby the two powers will confine their respective insular annexations in the Pacific Ocean within defined



areas or zones, and that under this arrangement the Marshall Islands fall within the zone where Germany can operate without coming into collision with Great Britain.

"It is not easy to see how either Great Britain or Germany can assert the right to control and to divide between them insular possessions which have hitherto been free to the trade of all flags, and which owe the civilizing rudiments of social organization they possess to the settlement of pioneers of other nationalities than British or German. If colonial acquisition were an announced policy of the United States, it is clear that this country would have an equal right with Great Britain or Germany to assert a claim of possession in respect of islands settled by American citizens, either alone or on a footing of equality with British and German settlers.

"There are islands in the Pacific Ocean known to be wholly in the undisturbed possession of American citizens as peaceable settlers, and there are many others where American citizens have established themselves in common with other foreigners. We, of course, claim no exclusive jurisdictional right by reason of such occupancy, and are not called upon to admit it in the case of like occupancy by others.

"What we think we have a right to expect, and what we are confident will be cheerfully extended as a recognized right, is that interests found to have been created in favor of peaceful American settlers in those distant regions shall not be disturbed by the assertion of exclusive claims of territorial jurisdiction on the part of any power which has never put forth any show of administration therein; that their trade and intercourse shall not in any way be hampered or taxed otherwise than as are the trade and intercourse of the citizens or subjects of the power asserting such exclusive jurisdiction, and in short, that the equality of their tenancy jointly with others, or the validity of their tenancy where they may be the sole occupants, shall be admitted according to the established principles of equity and justice."

Mr. Bayard, Sec. of State, to Mr. Pendleton, Feb. 27, 1886, MS. Inst. Germ. XVII. 602.

"As to the outlying unattached groups of islands [in the Pacific], dependent upon no recognized sovereignty, and settled sporadically by representatives of many nationalities whose tenure depends on prior occupancy of inhabited territory or on a good understanding with the natives of the inhabited islands, we conceive that the rights of American settlers therein should rest on the same footing as others. We claim no exclusive jurisdiction in their behalf, and are not called upon to admit on the part of any other nationality rights which might operate to oust our citizens from rights which they may be found to share equally with others. In cases of actual annexation of such islands by any foreign power, we should expect that our citizens peacefully established there would be treated on a basis of equality with the citizens or subjects of such power. These views have been communicated to our ministers at London and Berlin for their guidance." (Mr. Bayard, Sec. of State, to Mr. Morrow, Feb. 26, 1886, 159 MS. Dom. Let. 177.)

As to the claims of American citizens for compensation for lands alleged to have been owned by them and to have been appropriated by the British colonial government in Fiji, see the message of President Cleveland to the Senate, February 14, 1896, S. Ex. Doc. 126, 54 Cong., 1 sess. The message and accompanying report of the Secretary of State, together with the report of Mr. George H. Scidmore, special agent of the Department of State to investigate the claims, are reprinted in For. Rel. 1895, I. 739. Further correspondence is printed in S. Doc. 140, 56 Cong., 2 sess.

As to Webster's New Zealand land claims, see For. Rel. 1890, 344-356; For. Rel. 1893, 319; For. Rel. 1894, 287.

"I had the honor to receive in due course your note of the 6th ultimo, whereby you are pleased to inform me that, in virtue of a treaty engagement between a representative of the governor of the Portuguese possession of São Thomé and the Kingdom of Dahomey, Portugal has undertaken to exercise a protectorate over the entire sea-coast of Dahomey and to administer Portuguese jurisdiction over Europeans residing in those regions.

"In the absence of information as to how this change may affect the interests of any citizens of the United States domiciled or doing legitimate business in that part of Dahomey thus taken under the direct protection of Portugal, I am unable to do more than make a simple acknowledgment of the receipt of your note. I observe, indeed, that your note announces that your Government has pledged itself to respect the legitimate and preexistent rights of foreign powers to the territories embraced in this protectorate, and that, in consequence, jurisdictional rights as to the port of Cotomnu are left in abeyance pending the settlement of the claim of France thereto. The United States have no jurisdictional claims of sovereignty in that region which it might invite Portugal to respect, but it is to be assumed that the rights of any American citizens in the protected district will be respected as though they pertained to the Government of the United States. If citizens of the United States, equally with the citizens or subjects of other powers, establish themselves in uncivilized regions and acquire vested interests there in the same way as foreigners of other nationalities through good relationship with the natives, it is not to be supposed that, in the event of any one power (among the several represented by settlers there) assuming control of the country, our citizens will be discriminated against, in residence or trade, as compared with the subjects of the protecting power.

"This point is therefore necessarily reserved."

Mr. Bayard, Sec. of State, to the Viscount das Nogueiras, Portuguese min., March 3, 1886, For. Rel. 1886, 772.

"I have the honor to acknowledge the receipt of your note of the 22d ultimo, whereby you convey to this Government official information that the groups known as the Marshall, Brown and Providence

Islands, situated in the eastern part of the Caroline group, have been placed under the protection of His Majesty the Emperor and King, in pursuance of treaties concluded with the chiefs of those islands, in token of which possession has been taken under the imperial flag; it being understood that 'well-established rights of third parties are to be duly respected.'

"In the absence of precise knowledge as to where and to what extent the interest of citizens of the United States are among those well-established rights of third parties, which the Imperial Government declares its purpose to cause to be respected, I am unprepared to determine the importance to be attached to this announcement, although I believe I interpret it rightly as a frank and voluntary declaration that those American citizens who already have established or may hereafter establish themselves on those islands, in peaceful accord with the natives, and on a footing of perfect equality with settlers of German and other nationality, will not be disturbed in their rights of residence and intercourse, or discriminated against as compared with German subjects, by reason of this establishment of a German protectorate. This Government has never claimed for itself any exclusive privileges or rights in those regions growing out of the prior or contemporaneous settlements of American citizens, and it can not, of course, anticipate that any such exclusive privileges or rights will be claimed on behalf of other nationalities to the prejudice of Americans."

Mr. Bayard, Sec. of State, to Mr. von Alvensleben, German min., March 4, 1886, For. Rel. 1886, 333. For the German announcement of the regulation of the Solomon Islands, under the protectorate of the New Guinea Company, see Mr. von Alvensleben, German min., to Mr. Bayard, Sec. of State, Feb. 15, 1887, For. Rel. 1887, 419. In 1899 Germany acquired from Spain the Caroline Islands, and all the Ladrões, except Guam, which had been ceded to the United States. (Ann. Reg. 1899 [334], 31.) See, as to the rights of American citizens in the Carolines, For. Rel. 1886, 831-834.

In 1892 Captain Davis, H. B. M. S. *Royalist*, visited the Gilbert Islands and formally declared them to be under British protection. Citizens of the United States had during the preceding fifty years established themselves in the group, and on May 25, 1888, Mr. Adolph Rick was commissioned as United States commercial agent, accredited to the local authority, with residence at Butaritari. Captain Davis treated his commercial agency as having terminated on May 27, 1892, the day of the assumption of the British protectorate over the group, and declined to recognize him as a consular representative till he should be accredited to the Queen. With regard to this incident, and to the protection of the vested rights of American citizens in the islands, the Government of the United States said:

"In the course of the last few years foreign protectorates have been

asserted over territories where this Government had established consular representation, without interruption thereof, until a new appointment required a new act of recognition. Were the British protectorate over the Gilbert Islands deemed to be of a different character, involving the substitutory credence of the United States commercial agent forthwith to Her Britannic Majesty, this Government would have cheerfully considered the point on due intimation being given by Her Majesty's Government through the regular channels. I am unable to accept the action of Capt. Davis as such usual, timely, and friendly notice as is due from one power to another, nor can I suppose Her Majesty's Government desires or expects that it should be so accepted. . . .

"As I have already said, the germs of civilization were planted in the Gilbert group by the zealous endeavor of American citizens more than half a century ago. The result of this work, carried on by American citizens and money, has been, in fact, to change the naked barbarism of the island natives into enlightened communities and to lay the foundations of the trade and commerce which have given those islands importance in the eyes of Europe to-day. Wrought by the agents of a colonizing power, this development would have naturally led to a paramount claim to protection, control, or annexation, as policy might dictate. This country, however, has slept upon its rights to reap the benefits of the development produced by the efforts of its citizens; but it can not forego its inalienable privilege to protect its citizens in the vested rights they have built up by half a century of sacrifice and Christian endeavor. . . . You will take an early occasion to make these views known to the Earl of Rosebery. You will say to him that this Government believes that it has a right to expect that the rights and interests of the American citizens established in the Gilbert Islands will be as fully respected and confirmed under Her Majesty's protectorate as they could have been had the United States accepted the office of protection not long since solicited by the rulers of those islands."<sup>a</sup>

Lord Rosebery, on receiving these representations, gave "an assurance that the rights and interests of United States citizens established in the Gilbert Islands will be fully recognized and respected by the British authorities."<sup>b</sup> Instructions were subsequently given for the recognition of Mr. Rick in his consular capacity, and regret was expressed that he did not receive provisional recognition, although it was stated that Captain Davis appeared "to have been technically correct in his view that Mr. Rick's appointment should be notified to the protecting powers before he could be formally recognized."<sup>c</sup>

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<sup>a</sup> Mr. Foster, Sec. of State, to Mr. White, chargé at London, Nov. 5, 1892, For. Rel. 1892, 237, 239.

<sup>b</sup> For. Rel. 1892, 246.

<sup>c</sup> For. Rel. 1892, 250.

The military authorities of the United States in the Philippines were under no obligation to sustain or support arbitrary proceedings for the confiscation of the property of Spanish subjects on the ground of disloyalty, and when proceedings taken for that purpose had resulted, by abandonment or otherwise, in the original owners coming again into possession of their property, their right of possession was not open to question or inquiry on the part of the United States. It was therefore advised that the military governor should be directed to return to certain Spanish subjects in the Philippines all their property and possessions taken by the United States in pursuance of General Otis's order of November 25, 1898.

Griggs, At.-Gen., Feb. 21, 1899, 22 Op. 351.

By Article XIII. of the treaty of peace between the United States and Spain of December 10, 1898, it was provided that rights of property secured by copyrights and patents acquired by Spaniards in Cuba, Porto Rico, and the Philippines should be respected. It was advised that a patent or license granted July 11, 1898, to a Spaniard for the manufacture of hemp by steam in the Philippines for the term of five years was protected by this provision of the treaty if it was good under Spanish law, although the American law may give no identical rights. The stipulation, it was held, concerned "only Spanish rights acquired under Spanish laws," and that it embraced "property recognized by the Spanish laws which correspond with our patent laws, even if that property was not identical with that recognized by our laws."

Griggs, At.-Gen., Nov. 11, 1899, 22 Op. 617.

Rights of property in trade-marks in Cuba and the Philippines are entitled to the protection stipulated for "property of all kinds" in Arts. I. and VIII. of the treaty of peace between the United States and Spain of December 10, 1898; and trade-marks registered prior to that time in the international registry at Berne are entitled to the same recognition and protection from the military governments of Cuba and the Philippines as trade-marks registered in the national registry at Madrid or in one of the provincial registries of the islands.

Mr. Magoon, law officer, division of insular affairs, War Dept., March 27, 1901, Magoon's Reps. 305.

See, further, as to the protection of property rights under Arts. I. and VIII. of the treaty of peace, Magoon's Reports, 541.

The rights of municipalities were not destroyed in the territory transferred by Spain to the United States, and their rights of property were protected by Art. VIII. of the treaty of cession.

Reports of Mr. Magoon, law officer, Magoon's Reports, 374, 650.

As to mining claims and appurtenant privileges in Cuba, Porto Rico, and the Philippines, see Magoon's Reports, 351.

The situation in the New Hebrides is regulated by the Anglo-French convention of November 16, 1887, supplemented by the agreement of January 26, 1888. This arrangement was in the nature of a compromise. The Australians desisted from their agitation in favor of annexation and the French withdrew the two naval stations which they had established in the archipelago. The protection of persons and property was entrusted to a joint commission composed of two English and two French officers and a president, who, in alternate months, was to be the French or English commanding officer on the station. The conventions have, it is stated, been found to possess two radical defects in failing to regulate (1) the acquisition of land, and (2) the importation of arms, ammunition, and alcohol. In consequence, grave disputes have arisen between the English and the French as to the purchase and ownership of real property, and also as to the labor question.

*The London Times Weekly Edition, Jan. 3, 1902, supplement, iv.*

In 1728 Don Sebastian Calvo de la Puerta bought at public auction from the Spanish Crown the office of "Alguacil mayor," or high sheriff, of the city of Habana, Cuba. The office was declared to be perpetual and inheritable, and it finally descended to the Countess of O'Reilly y Buena Vista. Its duties included the inspection of the meat supply, and for this service the holder was authorized to exact a certain sum for each head of cattle killed at the slaughterhouse. This privilege was alleged to be worth a large amount of money, a half interest in which was purchased at judicial sale in 1895 by Dr. Don Gustavo Gallet Duplessis, for the satisfaction of a private debt. On the American occupation of Habana, the military authorities of the United States refused to allow the Countess of Buena Vista and Dr. Duplessis to exercise the authority or enjoy the emoluments of the office. They subsequently appealed to the Government of the United States, contending (1) that the office was property, and (2) that as such it was protected by Art. VIII. of the treaty of peace of Dec. 10, 1898, and by international law. It was advised (1) that, although the perpetual incumbency of the office was sold by Spain, it was a right subject to be resumed by the sovereign whenever the public welfare required it; (2) that it rested on a contract with Spain, personal in its nature, which, as it was not assumed by the United States in the treaty of peace, did not pass with the transfer of sovereignty; (3) that whether the obligations of Spain in Cuba were to be assumed by the Government established by the people of the island was a question to be determined by that Government when it should come into existence; (4) that the question whether the municipality of Habana was, as was contended, liable for the payment of an indemnity by reason of any proceedings prior to the military occupation of the

United States was one which might properly be referred to the Cuban courts.

Report of Mr. Magoon, law officer, Division of Insular Affairs, Aug. 8, 1900, Magoon's Reports, 194. See, also, the case of Antonio Alvarez Nava y Lobo, a notary, in Porto Rico, Magoon's Reports, 454.

"I can not assent to the proposition that the right to perform any part of the duties or receive any part of the compensation attached to the office of sheriff of Habana under Spanish sovereignty constituted a perpetual franchise which could survive that sovereignty. The fact that the Spanish Crown permitted an office to be inherited or purchased does not make it any the less an office the continuance of which is dependent upon the sovereignty which created it.

"The services which the petitioner claims the right to render and exact compensation for are in substance an exercise of the police power of the State. The right to exercise that power under Spanish appointment or authority necessarily terminated when Spanish sovereignty in Cuba ended. It thereupon became the duty of the military governor to make a new provision under which this part of the power of the new sovereignty, which took the place of the sovereignty of Spain, should be exercised and the necessary service rendered to the public. The petitioner has been deprived of no property whatever. The office, right, or privilege which she had acquired by inheritance was in its nature terminable with the termination of the sovereignty on which it depended.

"The question whether by reason of anything done before that time the right to compensation from the municipality of Habana has arisen is a question to be determined by the courts of Cuba.

"The application for the revocation of the order heretofore made herein by the military governor of Cuba is denied."

Decision of Mr. Root, Secretary of War, in the matter of the application of the Countess of Buena Vista, Dec. 24, 1900, Magoon's Reports, 209.

## V. TERRITORIAL EXPANSION OF THE UNITED STATES.

### 1. DECLARATIONS OF POLICY.

#### § 100.

"It will be objected to our receiving Cuba that no limit can then be drawn to our future acquisitions. Cuba can be defended by us without a navy, and this develops the principle which ought to limit our views. Nothing should ever be accepted which would require a navy to defend it."

Mr. Jefferson to President Madison, Apr. 27, 1809, 5 Jeff. Works, 443.

"*Time* is acting for us; and if we shall have the wisdom to trust its operation, it will assert and maintain our right with resistless force,

without costing a cent of money or a drop of blood. There is often, in the affairs of Government, more efficiency and wisdom in non-action than in action. All we want to effect our object in this case is 'a wise and masterly inactivity.' Our population is rolling towards the shores of the Pacific with an impetus greater than what we realize. It is one of those forward movements which leaves anticipation behind. In the period of thirty-two years which have elapsed since I took my seat in the other house, the Indian frontier has receded a thousand miles to the west. At that time our population was much less than half what it is now. It was then increasing at the rate of about a quarter of a million annually; it is now not less than six hundred thousand, and still increasing at the rate of something more than 3 per cent. compound annually. At that rate it will soon reach the yearly increase of a million. If to this be added that the region west of Arkansas and the State of Missouri, and south of the Missouri River, is occupied by half-civilized tribes, who have their lands secured to them by treaty (and which will prevent the spread of population in that direction), and that this great and increasing tide will be forced to take the comparatively narrow channel to the north of that river and south of our northern boundary, some conception may be formed of the strength with which the current will run in that direction and how soon it will reach the eastern gorges of the Rocky Mountains. I say some conception, for I feel assured that the reality will outrun the anticipation. In illustration, I will repeat what I stated when I first addressed the Senate on this subject. As wise and experienced as was President Monroe, as much as he had witnessed of the growth of our country in his time, so inadequate was his conception of its rapidity, that near the close of his administration—in the year 1824—he proposed to colonize the Indians of New York and those north of the Ohio River and east of the Mississippi, in what is now called the Wisconsin Territory, under the impression that it was a portion of our territory so remote that they would not be disturbed by our increasing population for a long time to come. It is now but eighteen years since, and already, in that short period, it is a great and flourishing territory ready to knock at our door for admission as one of the sovereign members of the Union. But what is still more striking, what is really wonderful and almost miraculous is that another territory (Iowa), still farther west (beyond the Mississippi) has sprung up as if by magic, and has already outstripped Wisconsin, and may knock for entrance before she is prepared to do so. Such is the wonderful growth of a population which has attained the number ours has—yearly increasing at a compound rate—and such the impetus with which it is forcing its way, resistlessly, westward. It will soon, far sooner than anticipated, reach the Rocky Mountains, and be ready to pour into the Oregon Territory, when it will come into our possession without resistance or struggle; or, if there should be resistance, it would be feeble and ineffectual.



*We should then be as much stronger there, comparatively, than Great Britain, as she is now stronger than we are; and it would then be as idle for her to attempt to assert and maintain her exclusive claim to the territory against us, as it would now be in us to attempt it against her. Let us be wise and abide our time; and it will accomplish all that we desire with more certainty and with infinitely less sacrifice than we can without it."*

Speech of Mr. Calhoun, on the Oregon bill, in the Senate, Jan. 24, 1843; 4 Calhoun's Works, 245 et seq.

"It is our policy to increase by growing and spreading out into unoccupied regions, assimilating all we incorporate. In a word, to increase by accretion, and not through conquest by the addition of masses held together by the cohesion of force. No system can be more unsuited to the latter process, or better adapted to the former, than our admirable Federal system. If it should not be resisted in its course, it will probably fulfill its destiny, without disturbing our neighbors or putting in jeopardy the general peace; but if it be opposed by foreign interference, a new direction would be given to our energy, much less favorable to harmony with our neighbors and to the general peace of the world. The change would be undesirable to us, and much less in accord with what I have assumed to be primary objects of policy on the part of France, England, and Mexico."

Mr. Calhoun, Sec. of State, to Mr. King, Aug. 12, 1844, MS. Inst., France, XV. 8, 12.

This passage seems to have suggested the title of § 72 of Wharton's Int. Law Digest—"Accretion, not colonization, the policy of the United States." It appears, however, that the idea of Mr. Calhoun was accretion by means of colonization, as opposed to the increase of territory by conquest. Indeed, "accretion" and "colonization," instead of involving opposite conceptions, rather represent different aspects of the same principle, accretion being the result of the colonizing process described by Mr. Calhoun in his speech on the Oregon bill, *supra*.

"Until recently, the acquisition of outlying territory has not been regarded as desirable by us. The purchase of Russian America and the proposed purchase of the Danish West India islands of St. Thomas and St. John may seem to indicate a reversal of the policy adverted to. Those measures, however, may be presumed to have been adopted for special reasons." But, in any event, it appeared to be inadvisable to decide upon an offer of other distant territory while the question of St. Thomas and St. John was pending, and, even if that question were disposed of, the President, before making up his mind in regard to such an offer, probably would prefer to consult Congress in regard to it, either directly or indirectly.

Mr. Fish, Sec. of State, to Mr. Bartlett, min. to Sweden, June 17, 1869, MS. Inst. Sweden, XIV. 168.

It is not the policy of the United States to undertake in Africa the management of movements within the particular range of private enterprise.

Mr. Fish, Sec. of State, to Sir E. Thornton, Apr. 8, 1873, MS. Notes, Gr. Brit. XVI. 74.

"The policy of this Government, as declared on many occasions in the past, has tended toward avoidance of possessions disconnected from the main continent. Had the tendency of the United States been to extend territorial dominion beyond intervening seas, opportunities have not been wanting to effect such a purpose, whether on the coast of Africa, in the West Indies, or in the South Pacific. No such opportunity has been hitherto embraced, and but little hope could be offered that Congress, which must in the ultimate resort be brought to decide the question of such transmarine jurisdiction, would favorably regard such an acquisition as His Excellency proposes. At any rate, in its political aspect merely, this Government is unprepared to accept the proposition without subjection to such wishes as Congress and the people of the United States through Congress may see fit to express."

Mr. Frelinghuysen, Sec. of State, to Mr. Langston, June 20, 1882, MS. Inst. Hayti, II. 339, referring to a proposal of President Salomon to cede to the United States the island La Fortue.

"A conviction that a fixed policy, dating back to the origin of our constitutional Government, was considered to make it inexpedient to attempt territorial aggrandizement which would require maintenance by a naval force in excess of any yet provided for our national uses, has led this Government to decline territorial acquisitions. Even as simple coaling stations, such territorial acquisitions would involve responsibility beyond their utility. The United States have never deemed it needful to their national life to maintain impregnable fortresses along the world's highways of commerce. To considerations such as these prevailing in Congress the failure of the Samana lease and the St. Thomas purchase were doubtless due. During the years that have since elapsed there has been no evidence of a change in the views of the national legislature which would warrant the President in setting on foot new projects of the same character."

Mr. Frelinghuysen, Sec. of State, to Mr. Langston, Feb. 1, 1884, MS. Inst., Hayti, II. 380, with reference to a proposal to cede to the United States "the peninsula and bay of Le Mole, or even of the whole Island of Tortuga."

"The policy of the United States, declared and pursued for more than a century, discountenances and in practice forbids distant colonial acquisitions. Our action in the past touching the acquisition of territory by purchase and cession, and our recorded disinclination to avail

ourselves of voluntary proffers made by other powers to place territories under the sovereignty or protection of the United States, are matters of historical prominence.”

Mr. Bayard, Sec. of State, to Mr. Pendleton, Sept. 7, 1885, MS. Inst., Germ. XVII. 547.

“Maintaining, as I do, the tenets of a line of precedents from Washington’s day, which proscribe entangling alliances with foreign states, I do not favor a policy of acquisition of new and distant territory, or the incorporation of remote interests with our own.”

President Cleveland, First Annual Message, 1885.

## 2. LOUISIANA.

### § 101.

The treaty and two conventions concluded at Paris under the date of April 30, 1803, by Messrs. Livingston and Monroe on the part of the United States, and M. Marbois on the part of France, in relation to the cession of Louisiana to the United States, were laid by President Jefferson before the Senate on the 17th of October, 1803, and the circumstances of the transaction were at the same time explained in a message to both Houses of Congress.

Am. State Papers, For. Rel. II. 506. The treaty ceded Louisiana to the United States. One of the conventions provided for the payment by the United States to France of 60,000,000 francs; the other, for the payment by the United States of “debts” due by France to citizens of the United States to an amount not exceeding 20,000,000 francs. (Moore, *Int. Arbitrations*, V. 4434.) See Howard, *The Louisiana Purchase* (Chicago, 1902); Hosmer, *Hist. of the Louisiana Purchase* (New York, 1902).

“On different occasions since the commencement of the French revolution, opinions and reports have prevailed that some part of the Spanish possessions, including New Orleans and the mouth of the Mississippi, had been or was to be transferred to France. . . . The whole subject will deserve and engage your early and vigilant inquiries, and may require a very delicate and circumspect management. What the motives of Spain in this transaction may be, is not so obvious. The policy of France in it, so far, at least, as relates to the United States, cannot be mistaken. . . . Although the two countries are again brought together by stipulations of amity and commerce, the confidence and cordiality which formerly subsisted have had a deep wound from the occurrences of late years. Jealousies probably still remain, that the Atlantic States have a partiality for Great Britain, which may, in future, throw their weight into the scale of that rival. It is more than possible, also, that, under the influence of those jealousies, and of the alarms which have at times prevailed, of

a projected operation for wresting the mouth of the Mississippi into the hands of Great Britain, she may have concluded a preoccupation of it by herself to be a necessary safeguard against an event from which that nation would derive the double advantage of strengthening her hold on the United States, and of adding to her commerce a monopoly of the immense and fertile region communicating with the sea through a single outlet. This view of the subject, which suggests the difficulty which may be found in diverting France from the object, points, at the same time, to the means that may most tend to induce a voluntary relinquishment of it. She must infer, from our conduct and our communications, that the Atlantic States are not disposed to enter, nor are in danger of being drawn, into partialities towards Great Britain unjust or injurious to France; that our political and commercial interests afford a sufficient guaranty against such a state of things; that, without the cooperation of the United States, Great Britain is not likely to acquire any part of the Spanish possessions on the Mississippi; and that the United States never have favored, nor, so long as they are guided by the clearest policy, ever can favor, such a project. She must be led to see again, and with a desire to shun, the danger of collisions between the two republics, from the contact of their territories; and from the conflicts in their regulations of a commerce involving the peculiarities which distinguish that of the Mississippi."

Mr. Madison, Sec. of State, to Mr. Charles Pinckney, minister to Spain, June 9, 1801, *Am. State Papers*, II. 510.

A treaty had already been concluded, at St. Ildefonso, Oct. 1, 1800, for the restoration of Louisiana by Spain to France. (*Am. State Papers*, *For. Rel.* II. 511; *Davis' Notes*, *Treaty Volume* (1776-1887), 1307; *Adams' History of the United States*, I. 370.)

"Should it be found that the cession from Spain to France has irrevocably taken place, or certainly will take place, sound policy will require, in that state of things, that nothing be said or done which will unnecessarily irritate our future neighbors, or check the liberality with which they may be disposed to exercise in relation to the trade and navigation through the mouth of the Mississippi; everything being equally avoided, at the same time, which may compromit the rights of the United States beyond those stipulated in the treaty between them and Spain. . . . In the next place, it will deserve to be tried whether France cannot be induced to make over to the United States the Floridas, if included in the cession to her from Spain, or at least West Florida, through which several of our rivers, particularly the important river Mobile, empty themselves into the sea."

Mr. Madison, Sec. of State, to Mr. Livingston, minister to France, Sept. 28, 1801, *Am. State Papers*, *For. Rel.* II. 510.

“The cession of Louisiana and the Floridas by Spain to France works most sorely on the United States. . . . It completely reverses all the political relations of the United States, and will form a new epoch in our political course. . . . There is on the globe one single spot, the possessor of which is our natural and habitual enemy. It is New Orleans, through which the produce of three-eighths of our territory must pass to market, and from its fertility it will ere long yield more than half of our whole produce, and contain more than half of our inhabitants. France, placing herself in that door, assumes to us the attitude of defiance. Spain might have retained it quietly for years. Her pacific dispositions, her feeble state, would induce her to increase our facilities there so that her possession of the place would hardly be felt by us, and it would not, perhaps, be very long before some circumstance might arise which might make the cession of it to us the price of something of more worth to her. Not so can it ever be in the hands of France; the impetuosity of her temper, the energy and restlessness of her character, placed in a point of eternal friction with us and our character, which, though quiet and loving peace and the pursuit of wealth, is high-minded, despising wealth in competition with insult or injury, enterprising, and energetic as any nation on earth. These circumstances render it impossible that France and the United States can continue long friends when they meet in so irritable a position. . . . The day that France takes possession of New Orleans fixes the sentence which is to retain her forever within her low-water mark. It seals the union of two nations who, in conjunction, can maintain exclusive possession of the ocean. From that moment we must marry ourselves to the British fleet and nation. . . . This is not a state of things we seek or desire. It is one which this measure, if adopted by France, forces on us as necessarily as any other cause, by the laws of nature, brings on its necessary effect. It is not from a fear of France that we deprecate this measure proposed by her, for, however greater her force is than ours, compared in the abstract, it is nothing in comparison to ours when to be exerted on our soil, but it is from a sincere love of peace, and a firm persuasion that, bound to France by the interests and strong sympathies still existing in the minds of our citizens, and holding relative positions which insure their continuance, we are secure of a long course of peace, whereas the change of friends, which will be rendered necessary if France changes that position, embarks us necessarily as a belligerent power in the first war of Europe. In that case France will have held possession of New Orleans during the interval of a peace, long or short, at the end of which it will be wrested from her. Will this short-lived possession have been an equivalent to her for the transfer of such a weight into the scale of her enemy? Will not the amalgamation of a young, thriving nation continue to that enemy the

health and force which are now so evidently on the decline? And will a few years' possession of New Orleans add equally to the strength of France? She may say she needs Louisiana for the supply of her West Indies. She does not need it in time of peace, and in war she could not depend on them, because they would be so easily intercepted."

President Jefferson to Mr. Livingston, minister to France, April 18, 1802, Jefferson's Works, IV. 431-433; Randall's Jefferson, III. 6.

Sec. to the same effect, Mr. Madison, Sec. of State, to Mr. Livingston, May 1, 1802, Am. State Papers, For. Rel. II. 516; Mr. Madison, Sec. of State, to Mr. Chas. Pinckney, May 11, 1802, id. 517; Mr. Madison, Sec. of State, to Mr. Livingston, Oct. 15, 1802, id. 525.

"Mr. Monroe will be the bearer of the instructions under which you will jointly negotiate. The object of them will be to procure a cession of New Orleans and the Floridas to the United States; and consequently the establishment of the Mississippi as the boundary between the United States and Louisiana. In order to draw the French Government into the measure, a sum of money will make part of our propositions; to which will be added, such regulations of the commerce of that river, and of the others entering the Gulf of Mexico, as ought to be satisfactory to France. From a letter, received by the President . . . , it is inferred, with probability, that the French Government is not averse to treat on those grounds. And such a disposition must be strengthened by the circumstances of the present moment."

Mr. Madison, Sec. of State, to Mr. Livingston, min. to France, Jan. 18, 1803, Am. State Papers, For. Rel. II. 529.

See, also, Mr. Madison, Sec. of State, to Mr. Pinckney, min. to Spain, Jan. 18, 1803, *ibid.*; Mr. Madison, Sec. of State, to Messrs. Pinckney and Monroe, Feb. 17, 1803, id. 532; Mr. Madison, Sec. of State, to Messrs. Livingston and Monroe, March 2, 1803, and April 18, 1803, id. 540, 555. Also, *Annals of Congress*, 7 Cong. 2 sess. (1802-3), 1100.

"M. Talleyrand asked me this day, when pressing the subject [of the cession of New Orleans and the Floridas], whether we wished to have the whole of Louisiana. I told him no; that our wishes extended only to New Orleans and the Floridas; that the policy of France, however, should dictate (as I had shown him in an official note) to give us the country above the river Arkansas, in order to place a barrier between them and Canada. He said, that if they gave New Orleans the rest would be of little value; and that he would wish to know 'what we would give for the whole.' I told him it was a subject I had not thought of; but that I supposed we should not object to twenty millions, provided our citizens were paid. He told me that this was too low an offer; and that he would be glad if I would reflect upon it and tell him to-morrow. I told him that, as Mr. Monroe would be in town in two days, I would delay my further offer until I had the pleasure of introducing him. He added, that he did not speak from authority, but that the idea had struck him. I have reason, however, to think that this

resolution was taken in council on Saturday. . . . I think, from every appearance, that war is very near at hand; and, under these circumstances, I have endeavored to impress the Government that not a moment should be lost, lest Britain should anticipate us. . . . Mr. Monroe arrived on the 1st at Havre."

Mr. Livingston, min. to France, to Mr. Madison, Sec. of State, April 11, 1803, Am. State Papers, For. Rel. II. 552.

"This day Mr. Monroe passed with me in examining my papers; and while he and several other gentlemen were at dinner with me, I observed the Minister of the Treasury [M. Marbois] walking in my garden. . . . He told me that he wished me to repeat what I had said relative to M. Talleyrand's requesting a proposition from me as to the purchase of Louisiana. . . . He said, that what I had told him led him to think that what the Consul had said to him on Sunday, at St. Cloud, . . . had more of earnest than he thought at the time; that the consul had asked him what news from England? As he knew he read the papers attentively, he told him that he had seen in the London papers the proposition for raising fifty thousand men to take New Orleans. The Consul said he had seen it, too, and had also seen that something was said about two millions of dollars being disposed of among the people about him, to bribe them, etc.; and then left him. That afterwards, when walking in the garden, the Consul came again to him, and spoke to him about the troubles that were excited in America, . . . He [Marbois] then took occasion to mention his sorrow that any cause of difference should exist between our countries. The Consul told him, in reply, 'Well, you have the charge of the Treasury; let them give you one hundred millions of francs, and pay their own claims, and take the whole country.' Seeing, by my looks, that I was surprised at so extravagant a demand, he added that he considered the demand as exorbitant, and had told the First Consul that the thing was impossible; that we had not the means of raising that. The Consul told him we might borrow it. . . . He then pressed me to name the sum. . . . I told him that we had no sort of authority to go to a sum that bore any proportion to what he mentioned; but that, as he himself considered the demand as too high, he would oblige me by telling me what he thought would be reasonable. He replied that, if we would name sixty millions, and take upon us the American claims, to the amount of twenty more, he would try how far this could be accepted. I told him that it was vain to ask anything that was so greatly beyond our means; . . ."

Mr. Livingston, min. to France, to Mr. Madison, Sec. of State, Apr. 13, 1803, midnight, Am. State Papers, For. Rel. 553. See, also, pp. 554-583.

"The failure of the Treaty of Amiens to restore a permanent peace induced Napoleon to determine to transfer all the Louisianas to the United States. . . . When it [the negotiation] was concluded, Napoleon said: 'This accession of territory consolidates forever the power of the United

States, and I have just given to England a maritime rival who sooner or later will humble her pride.' " (Davis, *Notes, Treaty Volume* (1776-1887), 1307, citing *Garden, Traité de Paix*, VIII. 88. See, also, *Adams' History of the United States*, II. 17, 26-42.)

"Congress witnessed, at their last session, the extraordinary agitation produced in the public mind by the suspension of our right of deposit at the port of New Orleans, no assignment of another place having been made according to treaty. They were sensible that the continuance of that privation would be more injurious to our nation than any consequences which could flow from any mode of redress, but reposing just confidence in the good faith of the Government whose officer had committed the wrong, friendly and reasonable representations were resorted to, and the right of deposit was restored.

"Previous, however, to this period, we had not been unaware of the danger to which our peace would be perpetually exposed while so important a key to the commerce of the Western country remained under foreign power. Difficulties, too, were presenting themselves as to the navigation of other streams, which, arising within our territories, pass through those adjacent. Propositions had, therefore, been authorized for obtaining on fair conditions the sovereignty of New Orleans, and of other possessions in that quarter interesting to our quiet, to such extent as was deemed practicable; and the provisional appropriation of two millions of dollars, to be applied and accounted for by the President of the United States, intended as part of the price, was considered as conveying the sanction of Congress to the acquisition proposed. The enlightened Government of France saw, with just discernment, the importance to both nations of such liberal arrangements as might best and permanently promote the peace, friendship, and interests of both; and the property and sovereignty of all Louisiana, which had been restored to them, have on certain conditions been transferred to the United States by instruments bearing date the 30th of April last. When these shall have received the constitutional sanction of the Senate, they will without delay be communicated to the Representatives also for the exercise of their functions as to those conditions which are within the powers vested by the Constitution in Congress. While the property and sovereignty of the Mississippi and its waters secure an independent outlet for the produce of the Western States, and an uncontrolled navigation through their whole course, free from collision with other powers and the dangers to our peace from that source, the fertility of that country, its climate and extent, promise in due season important aids to our Treasury, an ample provision for our posterity and a wide-spread field for the blessings of freedom and equal laws."

President Jefferson, Third Annual Message, Oct. 17, 1803.

For the approval of the Louisiana purchase by John Adams, see *Works*, IX. 631, 632.



As to the boundaries of Louisiana, see Adams, Hist. of the United States, II. 7, 13, 68, 245, 257-263, 273, 302-311; III., various pages; Houck, the Boundaries of the Louisiana Purchase (St. Louis, pp. 95). Also, The Louisiana Purchase, by Binger Hermann.

For debates in the Senate and the House on the treaty, see Annals of Congress, 8 Cong. 1 sess., 1803-4, pp. 45-70, 434-514, 545, 546.

See acts of Oct. 31, 1803, and March 19, 1804, 2 Stat. 245, 272.

As to trial by jury in Louisiana, see State v. Fuentes, 5 La. Ann. 427.

### 3. THE FLORIDAS.

#### § 102.

By the treaty signed at San Lorenzo el Real, October 27, 1795, the boundary between the United States and the Spanish colonies of East and West Florida was agreed upon in conformity with what had been stipulated in the treaty between Great Britain and the United States of 1782.<sup>a</sup> The United States subsequently laid claim to West Florida as part of the Louisiana cession.<sup>b</sup> A long negotiation, embracing the subject of spoliations, of the right of deposit at New Orleans, and the limits of Louisiana, as well as the purchase of the Floridas, ended in failure, and in 1808, in consequence of the political condition of Spain, diplomatic relations between the two countries were suspended.<sup>c</sup> At the close of the war in Europe diplomatic relations were restored, but a new source of complaints had then come into existence in the revolt of the Spanish colonies in America.<sup>d</sup> A negotiation, conducted sometimes at Washington and sometimes at Madrid, was entered upon for the settlement of all differences. Little progress, however, was made in it till 1818. On January 16 in that year the United States put forward a proposal under which Spain was, for various considerations, to cede all claims to territory eastward of the Mississippi, and either to accept for the western boundary the Rio Colorado from its mouth to its source, and a line thence to the northern limits of Louisiana, or to leave that boundary unsettled.<sup>e</sup> The Spanish minister offered to cede the Floridas, the United States agreeing to establish as the boundary between Louisiana and the Spanish possessions one of the branches of the Mississippi, either that of Lafourche or of the Atchafalaya, or else to adopt as the basis of settlement the *uti possidetis* of 1763. On these proposals and counter proposals a long discussion as to limits ensued. October 24, 1818, the Spanish minister submitted

<sup>a</sup> 1 Op. 108, Lincoln, 1802.

<sup>b</sup> Int. Arbitrations, V. 4519; Am. State Papers, For. Rel. I. 63; II. 564; III. 394-400, 539; Adams's History of the United States, V. 305-315; 2 Stats. 254.

<sup>c</sup> Int. Arbitrations, V. 4492-4493; Am. State Papers, II. 469, 596, 613, 615, 626, 635, 667; Adams's Hist. of the U. S., II. 3.

<sup>d</sup> Int. Arbitrations, V. 4494; Am. State Papers, For. Rel. III. 293.

<sup>e</sup> Mr. Adams, Sec. of State, to Chev. de Onis, Jan. 16, 1818, Am. State Papers, For. Rel. IV. 422.

certain propositions, which embraced the cession of the Floridas and the mutual renunciation of claims. Mr. Adams replied on the 31st of October, and brought the formal discussions practically to a close.<sup>a</sup> February 22, 1819, there was concluded a treaty which, besides defining the boundary between the Louisiana territory and the territories which were still to remain to Spain, conveyed to the United States not only the Floridas, but also all the Spanish titles north of the 42nd parallel of north latitude, from the source of the Arkansas River to the Pacific Ocean; the United States in return assuming the payment of claims of its citizens against Spain to an amount not exceeding 5,000,000 dollars, and engaging to cause satisfaction to be made for certain injuries suffered by the Spanish inhabitants of the Floridas at the hands of American forces, besides extending to Spanish commerce in the ceded territories, for the term of twelve years, privileges which were not to be allowed to any other nation.<sup>b</sup>

"The United States having proposed in 1816 to accept a cession of Florida as a basis of the release of the claims held by citizens of the United States against Spain, offered at the same time, by way of further compromise, to take the Colorado River as the western boundary of the Louisiana purchase, although that purchase had been previously maintained to extend as far as the Rio Grande. The Spanish minister, Onís, whose intrigues and turbulence had been a constant source of difficulty at Washington, insisted, in the first place, upon the restoration to Spain of that section of what was called West Florida which included Mobile and the adjacent country. He also presented as a set-off losses to Spain from depredations by expeditions which he alleged had been fitted out at New Orleans for the purpose of assisting the insurgents in Texas and Mexico; and he also claimed that vessels from the insurgent Spanish colonies should be excluded from the ports of the United States. In order to meet the latter complaints so far as they were reasonable, a statute was passed on March 3, 1816, which imposed a fine of ten thousand dollars, forfeiture of the vessels employed, and an imprisonment not exceeding ten years, on all persons engaged in fitting out vessels to cruise against powers with which the United States was at peace.<sup>c</sup> . . .

"The defiant patriotism of Mr. Adams was never more conspicuously shown than during his negotiations with Spain in respect to the purchase of the Floridas, and in no part of his public life were his faults of temper, and his antagonism to anyone by whom his personal

<sup>a</sup> Am. State Papers, For. Rel. IV. 530; Int. Arbitrations, V. 4496.

<sup>b</sup> Int. Arbitrations, V. 4496-4497, 4519 et seq.

<sup>c</sup> The date of the act was March 3, 1817. It provided that the fine should in no case exceed \$10,000, but left it to the discretion of the court to impose a lower penalty. (3 Stats. 370.) The representations of the Spanish minister may be found in Am. State Papers, For. Rel. IV. 184-189. Similar representations were also made by the Portuguese minister. (Case of the United States at Geneva, 138-140; Bemis' American Neutrality, 54 et seq.)

ambition was thwarted, less manifest. In Congress, the policy of the Administration in respect to the Floridas was at first looked upon coldly by the rising statesmen, among whom Mr. Clay took the lead, whose primary object was early recognition of South American independence. Florida would be valuable, but it would, in any view, be one of the prizes of a war with Spain which they expected as a necessary and not undesirable consequence of the interposition in South America they proposed. In support of the Administration, in delaying the recognition of the South American insurgents, were rallied several powerful agencies: (1) The commercial interests of the North, which deprecated a war which would expose their ships to Spanish privateers; (2) the Southeastern Atlantic States, of whom Mr. Forsyth was the leading spokesman in Congress, who desired to be relieved from border collisions by purchasing the Floridas at once; and (3), General Jackson, who here displayed that rare sagacity which afterwards so singularly came to his aid in mastering not only the opposition of others, but the impulse of his own passions. His personal instincts were for a Spanish war, and so his private unpublished letters, on file in the Department of State, show. He burned with resentment at what he considered Spanish atrocities which he thought were all the more injurious from the feebleness of the power by which they were upheld. He was ready to seize and occupy Pensacola and other posts which he thought harbored border Indians or hostile raiders. But while thus making the United States as uncomfortable a neighbor to Spain as he could, underneath all his correspondence with the Spanish authorities, lurked the suggestion, 'how much better for you to sell out.' And purchasing he urged on the Administration as far wiser, surer, and cheaper than conquering.

"Mr. Adams's diary explains the annoying vicissitudes to which the negotiation was subjected. It is due to him to say that in no portion of his diplomatic correspondence by which the archives of the Department of State is enriched, did he display more vigor and at the same time less impatience and harshness of expression, than in the remarkable papers which issued from him during this protracted negotiation with Spain. Of Onís, the Spanish minister at Washington, . . . it is sufficient here to say that looking upon the United States with a jealousy and dislike which he was so little able to repress that for some time his reception by the Government was refused, his diplomatic subtlety made him, when he entered at last on the negotiation, a fit instrument of the procrastination his instructions advised."<sup>a</sup>

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<sup>a</sup>De Onís was thus described by Mr. Adams: "Cold, calculating, wily, always commanding his own temper, proud because he is a Spaniard, but supple and cunning, accommodating the tone of his pretensions precisely to the degree of endurance of his opponent, bold and overbearing to the utmost extent to which it is tolerated, careless of what he asserts or how grossly it is proved to be unfounded, his morality appears to be that of the Jesuits as exposed by Pascal. He is laborious, vigilant, and ever attentive to his duties; a man of business and of the world." (Morse, *Life of J. Q. Adams*, 112.)

When, however, cession of some sort became at last the only alternative to war, and when it was clear that Onís's past conduct and present temper precluded him from successfully concluding the negotiation, the French minister, De Neuville, whose tact and kindliness were recognized by both interests, was called upon to intervene. A compromise was through this agency effected. . . . By this treaty, which was at once unanimously ratified by the Senate, the Floridas were supposed to be secured, as well as the disputed southwest boundary settled. Congress, having no doubt of the assent of Spain, passed, just on the eve of its adjournment, acts authorizing the establishing of local governments in the territory so won.

"But the assent of Spain was withheld, as Mr. Adams, with rising impatience and indignation, narrates in his diary and protests against in his correspondence. This refusal to accede to the treaty was caused in part by the dilatory temper of Cevallos, the Spanish prime minister, who was swayed to and fro by two conflicting policies—that of relieving his Government from the urgency of the spoliation claims, and that of national pride, swelled with resentment at the menacing tone assumed by the United States military authorities on the Florida border, and at the avowed sympathy of a large part of the population of the United States with the insurgents in the Spanish South American colonies."<sup>a</sup> . . .

"When the treaty for the purchase of Florida had been ratified by the Senate, Mr. Forsyth was sent with it to Spain, and almost at the same time Onís, whose relations to the United States had never, as has been seen, been cordial, returned to join the ministry at Madrid. Ferdinand's change of attitude may be explained by this change in his advisers. He had consented to the Florida negotiation under the impression that while it was pending South American independence would not be recognized. But Onís was convinced that when Florida was ceded South American independence would be recognized; and this conviction was easily communicated to both King and Cortes. Even the concession of Texas, unduly liberal as it was, did not relieve Spanish suspicions, since a filibustering invasion of Texas by adventurers who, though acting in contempt of Federal authorities, yet came from the United States, left the impression that after Florida was obtained by treaty, Texas would have to succumb. Had the Spanish Government, no matter for what motives, promptly disavowed the treaty as made in excess of instructions, the United States would have had no ground for substantial complaint, no matter what might have been the reasons for such disavowal.<sup>b</sup> But this the Spanish Government

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<sup>a</sup>See § 103, as to Texas.

<sup>b</sup>See, contra, Mr. Adams, Sec. of State, to Mr. Forsyth, Aug. 18, 1819, *Am. State Papers*, For. Rel. IV. 657-658. Mr. Adams not only maintained that the powers given to the minister were ample, but he also declared, "It is too well known, and they will not dare to deny it, that Mr. Onís' last instructions authorized him to concede much more than he did."

did not do. It is a principle of diplomacy that such disavowal should be prompt; no complaint came from Spain until seven months had passed. The announcement, after that period, that Spain meant to repudiate a bargain which the United States had taken every intermediate step to fulfill, naturally awakened in the minds of Mr. Monroe and of his Cabinet indignation as well as surprise. At first, as we are told in Mr. Adams' contemporaneous diary, the impulse was to occupy Florida, not merely on treaty grounds, but on grounds of necessity, to repel the raids of Indians and Spanish marauders which had their base in Florida. Spain, it was argued, has neither the power nor the will to keep Florida from being the starting ground for these outrages; it is necessary that the United States take the matter in its own hands. So urged Mr. Crawford, whose State (Georgia) was peculiarly exposed to these incursions; so at first felt Mr. Adams, incensed that the treaty with which his fame was identified should be repudiated. Mr. Monroe at the time yielded to this impulse, but after consideration he concluded to recommend, not immediate occupation, but occupation in the future, dependent on the action of Spain."<sup>a</sup>

Note of Dr. Wharton, *Int. Law Dig.*, II. § 161a.

The ostensible ground of delay on the part of Spain was a question concerning certain large grants of land in Florida, made by the King of Spain to the Duke of Alagon, the captain of his guards; the Count of Punon Rostro, one of his chamberlains, and Mr. Vargas, treasurer of the household.<sup>b</sup> By Art. VIII. of the treaty it was provided that all grants of land made in the ceded territories, by His Catholic Majesty or his lawful authorities, before Jan. 24, 1818, should be ratified and confirmed; but that all grants made since that day, "when the first proposal, on the part of His Catholic Majesty, for the cession of the Floridas was made," should be null and void.<sup>c</sup> When the treaty was signed, the three grants in question were known in the United States by rumor, and were understood by the negotiators to be included in the annulment; but in order that the question might not be left undetermined, Mr. Forsyth, who was sent as minister to Spain for the purpose of exchanging the ratifications of the treaty, was instructed to present on that occasion a declaration to the effect that the grants were so included.<sup>d</sup> The Spanish Government objected to the declaration as an attempted alteration of the treaty, and returned one of Mr. Forsyth's notes because of the harshness of its language, at the same time saying that the King would send a representative to

<sup>a</sup> President Monroe's Ann. Message, Dec. 7, 1819. *Am. State Papers, For. Rel.* IV. 627.

<sup>b</sup> *Am. State Papers, For. Rel.* IV. 510, 524.

<sup>c</sup> This proposal may be found in *Am. State Papers, For. Rel.* IV. 464.

<sup>d</sup> *Am. State Papers, For. Rel.* IV. 652.

the United States to explain his intentions.<sup>a</sup> France, Great Britain, and Russia all counseled Spain to ratify the treaty, while they urged the United States to pursue a conciliatory course. It was under these circumstances that President Monroe, in his annual message to Congress of Dec. 7, 1819, recommended that the operation of the proposed law to carry the treaty into effect be made contingent, so as to afford "an opportunity for such friendly explanations as may be desired during the present session of Congress."<sup>b</sup>

In January, 1820, the Spanish Government sent out as its plenipotentiary Gen. Don Francisco Dionisio Vives.<sup>c</sup> He arrived in Washington early in April. His instructions were to temporize and delay. Besides repeating the objection to the proposed declaration as to grants, he declared it to be indispensable that the United States should suppress the "scandalous system of piracy" carried on from its ports, put an end to "unlawful armaments," and otherwise cause its territory to be respected, and agree not to form any relations with the revolutionary governments in the Spanish provinces in America.<sup>d</sup> It was soon learned, however, that a revolution had taken place in Spain, and that, the liberal constitution having been restored, the Government had decided to submit the question of the treaty to the Cortes. The United States rejected the conditions proposed by Gen. Vives, and insisted upon the annulment of the grants, but, in view of the change that had taken place in Spain, President Monroe, in a message to the House of May 9, 1820, advised forbearance, and Congress adjourned without authorizing the taking possession of the territory.<sup>e</sup> October 5, 1820, the Cortes in secret session advised the cession of the Floridas, and declared the controverted grants null and void. The Senate reaffirmed the treaty by all but four votes, and on Feb. 22, 1821, the ratifications were exchanged.<sup>f</sup>

The formal act of cession or certificate of transfer of East Florida to the United States was signed July 10, 1821, by Gov. Don José Coppinger, on the part of Spain, and Mr. Robert Butler, commis-

<sup>a</sup>Don Manuel Gonzales Salmon to Mr. Forsyth, Aug. 10, 1819, *Am. State Papers*, IV. 655-656. See as to the causes of Spain's delay, Mr. Adams, Sec. of State, to Mr. Lowndes, Dec. 21, 1819, *Am. State Papers*, *For. Rel.* IV. 674.

<sup>b</sup>*Am. State Papers*, *For. Rel.* IV. 627, 676.

<sup>c</sup>*Am. State Papers*, *For. Rel.* IV. 677-678.

<sup>d</sup>*Am. Stat. Papers*, *For. Rel.* IV. 676-680.

<sup>e</sup>*Am. State Papers*, *For. Rel.* IV. 676.

<sup>f</sup>*Int. Arbitrations*, V. 4497; *Am. State Papers*, *For. Rel.* IV. 612, 626, 650, 701; V. 127-133; Morse, *Life of J. Q. Adams*, 125; Schurz, *Life of Clay*, I. 165. For the purpose of settling land titles under Art. VIII., Congress established a board of three commissioners. For legislation on the subject, see acts of May 8, 1822, 3 *Stats.* 709; Feb. 28, 1824, 4 *Stats.* 6; March 3, 1825, *id.* 102; April 22, 1826, *id.* 156; Feb. 8, 1827, *id.* 202; May 22, 1828; *id.* 284; May 26, 1830, *id.* 405; Jan. 23, 1832, *id.* 496.

For further correspondence sent to the House Feb. 2, 1824, as to the treaty, see *Am. State Papers*, *For. Rel.* V. 263. Correspondence as to the execution of the treaty will be found in the same volume, at page 368.

sioner, on the part of the United States.<sup>a</sup> Aug. 8, 1821, Mr. Butler sent to Gov. Andrew Jackson an inventory of the public property, including fortifications and public edifices, transferred to him, accompanied with plans and charts. Two letters, dated Sept. 1 and Oct. 4, 1821, and relating, respectively, to the "archives of East Florida" and "maps, charts, etc., of the two Floridas," were addressed by Gov. Jackson to the Department of State, and were received by it, though they seem, with their enclosures, to have been mislaid. Many documents relating to the cession of the Floridas were sent to Congress by President Monroe with his annual message of Dec. 5, 1821.<sup>b</sup> In this message President Monroe mentioned the failure of the Cuban authorities to deliver over archives in their possession relating to the Floridas. In 1832 Mr. Jeremy Robinson, who was sent as commissioner to Havana for the purpose, obtained and sent to the United States a number of such documents, while others, which were in his possession at the time of his death, in 1834, were transmitted to the Department of State by Mr. N. P. Trist, consul at Havana. Among the latter is a list of the "Fincas" which belonged to H. C. M. at St. Augustine at the time of the evacuation.<sup>c</sup>

"It is the settled doctrine of the judicial department [following that of the executive and legislative departments] of this Government, that the treaty of 1819 ceded no territory west of the river Perdido, but only that east of it: and therefore all grants made by Spain after the United States acquired the country from France, in 1803, are void, if the lands granted lay west of that river; because made on the territory acquired by the treaty of 1803; which extended to the Perdido east. It was thus held in *Foster and Elam v. Neilson*, 2 Peters, 254, and again in *Garcia v. Lee*, 12 Peters, 515, and is not now open to controversy in this court. . . . The Spanish Government [however] continued to exercise jurisdiction over the country, including the city of Mobile, for some nine years; the United States not seeing proper to take possession, and Spain refusing to surrender it. . . . The right necessarily incident to the exercise of jurisdiction rendered it proper that permits to settle and improve by cultivation, or to authorize the erection of establishments for mechanical purposes, should be granted. . . . Although the United States disavowed that any right to the soil passed by such concessions, still they were not disregarded as giving no equity to the claimant; on the contrary," they were to a certain extent confirmed by the United States.

*Pollard's Lessee v. Files* (1844), 2 How. 591, 602, 603. S. P., *Pollard's Lessee v. Hagan*, 3 Pet. 212.

For an elaborate discussion of Spanish titles in West Florida, see report of Mr. Livingston, Sec. of State, to President Jackson, June 12, 1832, MS. Report Book, Dept. of State.

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<sup>a</sup> Mr. Butler to the Secretary of State, July 13, 1821, MSS, Dept. of State.

<sup>b</sup> Am. State Papers, For. Rel., IV. 740-808.

<sup>c</sup> Mr. Hunter, 2nd Asst. Sec. of State, to Mr. Dockray, Dec. 6, 1871, 91 MS. Dom. Let. 499.

## 4. TEXAS.

## § 103.

By the treaty signed at Washington, Feb. 22, 1819, by Mr. John Quincy Adams, Secretary of State, on the part of the United States, and Señor Don Luis de Onís, Spanish minister, on the part of His Catholic Majesty, the territory called Texas, lying between the Rio Grande del Norte, or Rio Bravo, and the river Sabine, a territory long in dispute between France and Spain, and after 1803 between Spain and the United States, was acknowledged to belong to Spain. Subsequently, on the independence of Mexico, it became a part of that country.<sup>a</sup>

"It is now well known that Mr. Adams maintained that the Rio Grande was the true southwestern boundary of the United States, and that he was overruled by a majority of the Cabinet, who concurred with Mr. Crawford in holding that Florida was so essential to the Southeastern States that the movement to obtain it should not be clogged by debatable demands for territory to the southwest. But even then there were statesmen, among whom was Mr. Clay, who, with the interests of the Mississippi Valley at heart, held that Texas was not only far more valuable and important to the United States than Florida, but that Texas already rightfully belonged to the United States. Whether General Jackson, who was appealed to by Mr. Adams for support on this issue, agreed with Mr. Adams as to making the Rio Grande the boundary, has been much disputed. Many years afterwards, when the annexation of Texas was opposed by Mr. Adams as an undue extension of slave territory, he produced his diary to show that General Jackson had advised its surrender by President Monroe. This was emphatically denied by General Jackson. The manuscript correspondence on file in the Department of State leads us to an intermediate position. General Jackson, when the Florida treaty was under consideration, approved of it as affording a settlement greatly to be preferred to a continuance of the border and Indian warfare which then existed on the Florida lines, or to a war with Spain which might be of indefinite duration and cost; and in view of what appeared to him the overwhelming importance of this issue he overlooked that of the southwestern boundary. There is nothing to show that the nature of our title to Texas, surrendered by the Florida treaty, was at that time brought to his notice. To President Monroe, however, the strength of this title was well known, and his voluminous unpublished correspondence shows with what conscientious and patient care it was considered by him. The ultimate annexation of Texas to the United States he seemed to consider as inevitable, and he declared over and

<sup>a</sup>That Texas was properly a part of Louisiana, see Adams, History of the United States, II. 7, 256, 294-300; III. 33-34, 40, 69, 80, 78, 139, 310.



over again that he would not permit it to be held by any European power but Spain. But the Missouri question was then looming portentously before his anxious eyes. He saw a great party in the North which was opposed to any extension of slave territory; he himself was no enthusiastic defender of slavery. If Texas had then been won, it could only have been brought into productive occupancy by slavery, affording a new stimulus to a surreptitious slave trade. In the course of time the dominant race of the North would flow down into it and take possession of it and occupy it, but that time had not yet come. It was better not to press a claim now for a territory for which we were not quite ready, when the effect might be to impede our acquisition of a territory which we needed at once. It is remarkable that this view of the acquisition of Texas was not shared by Mr. Adams, in whose mind the dangers of the extension of slavery had not yet become such as to influence his political course. He not only urged the assertion of our title to Texas, necessarily then a slave State, but he assented to the Missouri compromise, which gave the Southwest to slavery. The issue, in fact, was fraught with consequences which Mr. Monroe was the only leading statesman of his day to foresee. Texas, which would have then made six States of the size of Pennsylvania, would have been brought into the Union, and with the population which would soon have poured into its fertile plains, might have rivaled the Northwest as a field for pioneer settlement. Whatever might have been the effect of this on the future, in the final struggle with slavery, there is no question that the introduction of such an element of contention at that time would have been to expose the work of maintenance of the Union, which Mr. Monroe considered to be his especial charge, to perils he was unwilling to encounter."

Note of Mr. Wharton, *Int. Law Dig.*, 1st ed., II. 284-285, §161a.

See also Schurz, *Life of Henry Clay*, I. 162-165;

Morse, *Life of John Quincy Adams*, 110 et. seq.

In the instructions given to Mr. Poinsett, as United States minister to Mexico in 1825, it was suggested with reference to the limits between the two countries, under Art. III. of the treaty between the United States and Spain of Feb. 22, 1819, that "if the line were so altered as to throw altogether on one side Red River and Arkansas, and their respective tributary streams, and the line on the Sabine were removed further west," the United States would as an equivalent for the proposed cession stipulate to restrain, as far as practicable, the wild Indians inhabiting the territory from committing hostilities and depredations on the Mexican territories and people."

<sup>a</sup> Mr. Clay, Sec. of State, to Mr. Poinsett, March 26, 1825, H. Ex. Doc. 42, 25 Cong. 1 sess.; Br. and For. State Papers, XXVI. 830.

In 1829 Mr. Poinsett was directed to open negotiations for the purchase of "all that part of the province of Texas which lies east of a line beginning at the Gulf of Mexico, in the centre of the desert, or Grand Prairie, which lies west of the Rio Nueces, and is represented to be nearly two hundred miles in width, and to extend north to the mountains, the proposed line following the course of the centre of that desert or prairie north to the mountains, dividing the waters of the Rio Grande del Norte from those that run eastward to the Gulf; and until it strikes our present boundary at 42° north latitude." Various substitutionary lines were suggested with a view to meet any objections on the part of Mexico. The boundary then assumed by Mexico was "deemed objectionable, as well on the ground of its alleged uncertainty as for reasons of a different character," among which were the difficulties to which it gave rise in the repression of smugglers and outlaws, and the prevention of Indian depredations.<sup>a</sup>

In 1835 Colonel Anthony Butler, who bore to Mr. Poinsett the instructions of 1829, and who, later in the same year, succeeded Mr. Poinsett as the diplomatic representative of the United States in Mexico, was directed to offer half a million dollars for the bay of San Francisco and certain adjacent territory, the port of San Francisco being considered especially desirable as a place of resort for the numerous American whaling vessels operating in the Pacific. Mr. Butler was also to continue his efforts to obtain the cession of Texas.<sup>b</sup>

The independence of Texas was declared by a convention of delegates of the people on March 2, 1836.<sup>c</sup> In the following year the Government of the United States repelled an overture of annexation.<sup>d</sup>

"The Government of the United States sees with pain a prospect of the immediate resumption of active military operations between Texas and the Mexican Republic. While it claims no right to interfere in the controversy between those countries, it can not, under existing circumstances, be indifferent to a renewal of hostilities between them. Nearly seven years have now elapsed since Texas has maintained its independence, unmolested by invading troops. In that

<sup>a</sup> Mr. Van Buren, Sec. of State, to Mr. Poinsett, Aug. 25, 1829, H. Ex. Doc. 42, 25 Cong. 1 sess.; Br. and For. State Papers, XXVI. 850. A treaty confirming the limits under the Spanish treaty was signed by Mr. Poinsett, Jan. 12, 1828 (Am. State Papers, For. Rel. VI. 946), but the ratifications were not exchanged till April 5, 1832. See, as to delays in its execution, Br. and For. State Papers, XXVI. 870-872, 880 et seq.; treaty between the United States and Mexico of April 3, 1835; and Int. Arbitrations, II. 1213, touching the incident of the Gorostiza pamphlet.

<sup>b</sup> Mr. Forsyth, Sec. of State, Aug. 6, 1835, MS. Inst. Mex.; H. Ex. Doc. 42, 25 Cong. 1 sess.; Br. and For. State Papers, XXVI. 887; Mr. Forsyth, Sec. of State, to Mr. Butler, Nov. 9, 1835, MS. Inst. Mex.

<sup>c</sup> S. Ex. Doc. 415, 24 Cong. 1 sess.; Br. and For. State Papers, XXIV. 1269.

<sup>d</sup> H. Ex. Doc. 40, 25 Cong. 1 sess.; Br. and For. State Papers, XXV. 1404.

time she has contracted treaties with other powers in both hemispheres and has been making progress in the arts of peace. Events have detached her from Mexico and existing circumstances can not fail to indicate to all intelligent observers that her ultimate reannexation is among the things most to be doubted. It is notorious that the language, the laws and the habits of the people of the two countries are dissimilar, that in these and in other respects differences exist so wide, as not to promise happiness to a union between the population of the two states. Texas was heretofore the remotest northeastern province of Mexico, its distance from the Mexican capital is very great, and the character and population of the intervening country are such that Mexico could hardly hope to exercise over Texas an efficient authority. Without Texas, Mexico would still be not only one of the largest sovereignties of the world, but would possess territory which, for its position and other great natural advantages, would be difficult to be surpassed. Her jurisdiction would still extend over a vast space, embracing even in the same latitude, in consequence of the different degrees of elevation belonging to its different parts, almost every climate and every production of the habited globe, while with ports on both oceans, she offers facilities of commerce to the whole world. On the other hand Texas is sufficiently large for a respectable community. Her limits are defined and peace, with an opportunity of improving her resources, are much more important to her than any chances of territorial acquisition. The Government of the United States feels a strong interest in the welfare of both countries. Both are our neighbors, they are among the newly organized governments, the regenerated systems of this hemisphere. For their own prosperity as well as for the convenience and advantage of neighboring States, they require repose, security, and vigorous application to the arts of peace. Under these circumstances the President directs that if you should receive from the Mexican Government any intimation of its desire for the interposition or mediation of this Government for the purpose of bringing about peace between Texas and Mexico, you will state that such interposition or mediation will be cheerfully granted. So long, however, as either of those parties shall be resolved to remain at war with the other, and unless both of them shall request the mediation of the United States, the President would not be inclined to interfere. The opinion of this Government was expressed in a letter from Mr. Forsyth to Mr. Dunlap, late representative of Texas here, and in the letter of General Jackson to General Santa Anna, therein referred to, a copy of both of which is now transmitted.

“Although policy and duty dictate this reserve on our part, it is not to be disguised that the immediate and permanent interests of the

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<sup>a</sup> It is “are” in the record, but this doubtless is a copyist’s error for “is,” unless, indeed, the word “with,” in the preceding line, should be “and,”

United States call loudly for the cessation of hostilities between Texas and Mexico. So long as the war continues, our extensive commerce and navigation in the Gulf of Mexico are liable to vexations and interruptions from one or the other belligerent; our citizens who may desire to trade with or travel to Mexico across the Texan frontier may be driven back or be seized and their property confiscated, if for no other cause, from the difficulty if not impossibility for the Mexican local authorities to distinguish between them and Texans.

"It is proper to advert to another consideration, which has no small weight in the President's mind. It is the danger, should the war between Mexico and Texas be renewed and prosecuted by the use of considerable military forces, that citizens of the United States would be inclined to take part, either on the one side or the other, to such an extent as might possibly compromise the neutrality and peace of this country, or at least create jealousy and dissatisfaction. Nothing is more probable than that the renewal of the war between Mexico and Texas, and the known fact of the invasion of the latter country by the former, with a large force, would be an occasion for crowds of persons to enter Texas and take their share in the chances of the war. This is a topic upon which you can not, perhaps, very well speak fully and at length, to the Mexican Government, but a remote and delicate intimation of the probability of such occurrences might be made and ought to produce in the counsels of that government great caution and deliberation. The more general ground, which I have already stated, may be exhibited without reserve: that is the President's clear and strong conviction that the war is not only useless, but hopeless, without attainable object, injurious to both parties and likely to be, in its continuance, annoying and vexatious to other commercial nations. The President consequently relies upon your address to bring about the object desired, which he hopes may be accomplished within the limits which have been assigned."

Mr. Webster, Sec. of State, to Mr. Thompson, June 23, 1842, MS. Inst. Mexico, XV. 179.

"By the treaty of the 22d of February, 1819, between the United States and Spain, the Sabine was adopted as the line of boundary between the two powers. Up to that period no considerable colonization had been effected in Texas; but the territory between the Sabine and the Rio Grande being confirmed to Spain by the treaty, applications were made to that power for grants of land, and such grants, or permissions of settlement, were, in fact, made by the Spanish authorities in favor of citizens of the United States proposing to emigrate to Texas in numerous families, before the declaration of independence by Mexico. And these early grants were confirmed, as is well known, by successive acts of the Mexican Government, after its separation from Spain. In

January, 1823, a national colonization law was passed, holding out strong inducements to all persons who should incline to undertake the settlement of uncultivated lands; and although the Mexican law prohibited for a time citizens of foreign countries from settling, as colonists, in territories immediately joining such foreign countries, yet even this restriction was afterwards repealed or suspended, so that, in fact, Mexico, from the commencement of her political existence, held out the most liberal inducements to immigrants into her territories, with full knowledge that these inducements were likely to act, and expecting they would act, with the greatest effect upon citizens of the United States, especially of the Southern States, whose agricultural pursuits naturally rendered the rich lands of Texas, so well suited to their accustomed occupation, objects of desire to them. The early colonists of the United States, introduced by Moses and Stephen Austin under these inducements and invitations, were persons of most respectable character, and their undertaking was attended with very severe hardships, occasioned in no small degree by the successive changes in the Government of Mexico. They nevertheless persevered and accomplished a settlement. And, under the encouragements and allurements thus held out by Mexico, other emigrants followed, and many thousand colonists from the United States and elsewhere had settled in Texas within ten years from the date of Mexican independence. Having some reasons to complain, as they thought, of the government over them, and especially of the aggressions of the Mexican military stationed in Texas, they sought relief by applying to the supreme Government for the separation of Texas from Coahuila, and for a local government for Texas itself. Not having succeeded in this object, in the process of time, and in the progress of events, they saw fit to attempt an entire separation from Mexico, to set up a government of their own, and to establish a political sovereignty. War ensued; and the battle of San Jacinto, fought on the 21st of April, 1836, achieved their independence. The war was from that time at an end, and in March following the independence of Texas was formally acknowledged by the Government of the United States."

Mr. Webster, Sec. of State, to Mr. Thompson, Min. to Mexico, July 8, 1842, Webster's Works, VI. 445, 448.

See, as to Mexican complaints as to the course of the United States toward Texas, Br. & For. State Papers, XXXI. 801 et seq.

"I transmit a copy of two notes addressed to this Department by the chargé d'affaires of Texas. The first, dated the 14th ult., requests the interposition of this Government for the purpose of inducing that of the Mexican Republic to abstain from carrying on the war against Texas by means of predatory incursions, in which the proclamations and promises of the Mexican commanders are flagrantly violated, noncombatants seized and detained as prisoners of war, and

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.. "Near eight years have elapsed since Texas declared her independence. During all that time, Mexico has asserted her right of jurisdiction and dominion over that country, and has endeavored to enforce it by arms. Texas has successfully resisted all such attempts, and has thus afforded ample proofs of her ability to maintain her independence. This proof has been so satisfactory to many of the most considerable nations of the world, that they have formally acknowledged the independence of Texas and established diplomatic relations with her. Among those nations the United States are included, and, indeed, they set the example which other nations have followed. Under these circumstances the United States regard Texas as in all respects an independent nation, fully competent to manage its own affairs and possessing all the rights of other independent nations. The Government of the United States, therefore, will not consider it necessary to consult any other nation in its transactions with the Government of Texas."

Mr. Upshur, Sec. of State, to Mr. Almonte, Dec. 1, 1843, MS. Notes to Mexico. VI. 172, 178.

See, also, Mr. Upshur, Sec. of State, to Mr. Thompson, Oct. 20, 1843, MS. Inst. Mexico, XV. 264; Mr. Calhoun, Sec. of State, to Mr. Green, April 19, 1844, *id.* 293.

"Great Britain has recognized the independence of Texas; and having done so, she is desirous of seeing that independence finally and formally established, and generally recognized, especially by Mexico. . . . We have put ourselves forward in pressing the Government of Mexico to acknowledge Texas as independent. But in thus acting, we have no occult design, either with reference to any peculiar influence which we might seek to establish in Mexico or in Texas, or even with reference to the slavery which now exists, and which we desire to see abolished in Texas."

Earl of Aberdeen, British For. Secretary, to Mr. Pakenham, British minister at Washington, Dec. 26, 1843, Br. & For. State Papers, XXXIII. 232. For Mr. Calhoun's reply of April 18, 1844, see the same volume, p. 236. In this reply Mr. Calhoun animadverted upon the antislavery views expressed by Lord Aberdeen.

Mr. Calhoun, in a long instruction of Aug. 1, 1844, to the United States minister to France, refers to a declaration made by the King at the minister's reception, of friendliness toward the United States. This was, said Mr. Calhoun, the more gratifying as previous information was calculated to create the impression "that the Government of France was prepared to unite with Great Britain in a joint protest against the annexation of Texas and a joint effort to induce her Government to withdraw the proposition to annex, on condition that Mexico should be made to acknowledge her independence." (MS. Inst. France, XV. 8.)

A treaty for the annexation of Texas to the United States was signed at Washington, by Mr. Calhoun, on the part of the United States, and Messrs. Van Zandt and Henderson, on the part of Texas, April 12, 1844.<sup>a</sup> It was rejected by the Senate.<sup>b</sup>

<sup>a</sup> S. Ex. Doc. 341, 28 Cong. 1 sess.; Br. and For. State Papers, XXXIII. 252, 262.

<sup>b</sup> H. Ex. Doc. 271, 28 Cong. 1 sess.; Br. and For. State Papers, XXXIII. 258.

Mr. Calhoun directed the *chargé d'affaires* of the United States to assure the Government of Texas that the loss of the treaty did not necessarily involve the failure of the project of annexation. It was admitted, said Mr. Calhoun, that what was sought to be effected by the treaty might be secured by joint resolution, which would have the advantage of requiring only a majority of the two Houses, instead of two-thirds of the Senate. A joint resolution for that purpose had accordingly been introduced by Mr. McDuffie, of South Carolina, in the Senate, and was laid on the table by a vote of 19 to 27, many members being absent, on the ground that there was not sufficient time to act on it. Three of the absentees, and also three who voted to lay on the table, were known to be favorable to annexation. This being so, supposing the other absentees to be unfavorable, only two Senators were required to constitute a majority of the whole number. The indications in the other House were still more favorable.<sup>a</sup>

"No measure of policy has been more steadily or longer pursued, and that by both of the great parties into which the Union is divided [than the annexation of Texas]. Many believed that Texas was embraced in the cession of Louisiana, and was improperly, if not unconstitutionally, surrendered by the treaty of Florida in 1819. Under that impression, and the general conviction of its importance to the safety and welfare of the Union, its annexation has been an object of constant pursuit ever since. It was twice attempted to acquire it during the administration of Mr. Adams, once in 1825, shortly after he came into power, and again in 1827. It was thrice attempted under the administration of his successor, General Jackson, first in 1829, immediately after he came into power, again in 1833, and finally in 1835, just before Texas declared her independence. Texas herself made a proposition for annexation in 1837, at the commencement of Mr. Van Buren's administration, which he declined, not, however, on the grounds of opposition to the policy of the measure. The United States had previously acknowledged her independence, and the example has since been followed by France and Great Britain. The latter, soon after her recognition, began to adopt a line of policy in reference to Texas which has given greatly increased importance to the measure of annexation, by making it still more essential to the safety and welfare both of her and the United States."

Mr. Calhoun, Sec. of State, to Mr. Shannon, Sept. 10, 1844, MS. Inst. Mexico, XV. 309, 313.

See Mr. Calhoun, Sec. of State, to Mr. Pakenham, British minister, April 18, 1844, Br. and For. State Papers, XXXIII. 236.

By a joint resolution, approved March 1, 1845, Congress expressed its "consent" that the territory properly included within and rightfully belonging to the Republic of Texas might be erected into a new

<sup>a</sup> Mr. Calhoun, Sec. of State, to Mr. Howard, No. 1, June 18, 1844, MS. Inst. Texas.



State, to be called the State of Texas, with a republican form of government to be adopted by the people of said Republic by deputies in convention assembled with the consent of the existing government, in order that the State might be admitted as one of the States of the Union. The consent of Congress was given upon the following conditions:

1. That the State should be formed subject to the adjustment by the United States of all questions of boundary that might arise with other governments, and that the constitution of the State, with the proper evidence of its adoption by the people of Texas, should be transmitted to the President to be laid before Congress for its final action on or before January 1, 1846.

2. That the State when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the defense of the Republic, should retain all the public funds, debts, taxes, and dues of every kind which might belong to or be due and owing to the Republic, and should also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts of the Republic, and the residue of the lands, after discharging such debts and liabilities, to be disposed of as the State might direct, the debts and liabilities of the State in no event to become a charge upon the United States.

3. That new States of convenient size, not exceeding four in number in addition to the State of Texas and having sufficient population, might thereafter by the consent of Texas be formed out of its territory, which States should be entitled to admission under the provisions of the Federal Constitution; and it was further provided that such States as might be formed out of that part of the territory lying south of 36° 30' north latitude, commonly known as the Missouri compromise line, should be admitted into the Union with or without slavery as the people of each State asking admission might desire, but that in any State or States which should be formed out of the territory north of that line slavery or involuntary servitude except for crime should be prohibited.

The resolution further provided that if the President of the United States should deem it most advisable, instead of proceeding to submit the resolution to the Republic of Texas as an overture on the part of the United States for admission, to negotiate with that Republic, then that a State could be formed out of the Republic of Texas with suitable extent and boundaries, and with two Representatives in Congress until the next apportionment of representation, and should be admitted into the Union by virtue of the act on an equal footing with the existing States as soon as the terms and conditions of such admission and the cession of the remaining Texan territory to the United States should be agreed upon by the Governments of Texas and the United

States. The sum of \$100,000 was appropriated to defray the expenses of missions and negotiations to agree upon the terms of admission and cession, either by treaty to be submitted to the Senate, or by articles to be submitted to the two Houses of Congress, as the President might direct."

On December 29, 1845, the President approved a joint resolution of Congress for the admission of the State of Texas into the Union. This resolution referred to the joint resolution of March 1, 1845, and recited that the people of the Republic of Texas, by deputies, in convention assembled with the consent of the existing Government, had adopted a constitution and erected a new State with a republican form of government, and had, in the name of the people of Texas and by their authority, ordained and declared that they assented to and accepted the proposals, conditions, and guaranties contained in the first and second sections of the resolution of March 1. It further recited that the constitution, with the proper evidence of its adoption by the people of the Republic of Texas, had been transmitted to the President of the United States and laid before Congress. It was therefore declared that the State of Texas was admitted into the Union on an equal footing with the original States in all respects whatever, and that until the Representatives in Congress should be apportioned according to an actual enumeration of the inhabitants of the United States, the State should be entitled to choose two Representatives.<sup>b</sup>

"Texas had declared her independence, and maintained it by her arms for more than nine years. She has had an organized Government in successful operation during that period. Her separate existence as an independent state had been recognized by the United States and the principal powers of Europe. Treaties of commerce and navigation had been concluded with her by different nations, and it had become manifest to the whole world that any further attempt on the part of Mexico to conquer her or overthrow her Government would be in vain. Even Mexico herself had become satisfied of this fact; and while the question of annexation was pending before the people of Texas, during the past summer, the Government of Mexico, by a formal act, agreed to recognize the independence of Texas on condition that she would not annex herself to any other power. The agreement to acknowledge the independence of Texas, whether with or without this condition, is conclusive against Mexico. The independence of Texas is a fact conceded by Mexico herself, and she had no right or authority to prescribe restrictions as to the form of Government which Texas might afterward choose to assume."

President Polk, First Annual Message, Dec. 2, 1845.

Texas concluded treaties with France Sept. 25, 1839; with Great Britain Nov. 13, Nov. 14, and Nov. 16, 1840, and Feb. 6, 1844; with the Netherlands Sept. 18, 1840; with the United States April 11, and April 25, 1838.

The protest of Gen. Almonte, Mex. minister at Washington, of March 6, 1845, against the joint resolution of March 1 (*supra*), and Mr. Buchanan's reply of March 10, 1845, may be found in Br. and For. State Papers, XXXIII. 246-248.

See a communication of the envoy of France at Mexico to the President of Texas, May 20, 1845, as to Mexico's acceptance of a proposal to recognize the independence of Texas on condition that she would engage not to annex herself or become subject to any other power. (Id. 249.)

On June 15, 1845, the President of Texas proclaimed an armistice. (Id. 251.)

For various proclamations of the President of Texas, the ordinance of annexation of July 4, 1845, and the constitution of Texas, see *id.* 267-300.

As to the events preceding the outbreak of the Mexican war, see Int. Arbitrations, II. 1246 et seq.; H. Ex. Doc. 144, 28 Cong. 2 sess.; S. Ex. Doc. 81, 28 Cong. 2 sess.; S. Ex. Doc. 337, 29 Cong. 1 sess.; The Atlantic Monthly (1895), LXXVI. 371.

#### 5. OREGON.

#### § 104.

In 1792 Capt. Robert Gray, of the American ship *Columbia*, entered and explored the River of the West, which he named, from his ship, the Columbia River. On January 18, 1803, President Jefferson sent a confidential message to Congress recommending that an appropriation be made for western exploration, and in the following summer Lewis and Clark set out on their memorable expedition, in which, after having traversed the country west of the Mississippi, they entered the main branch of the Columbia and descended the river to its mouth. In 1811 John Jacob Astor, an American merchant, formed at Astoria a fur-trading settlement. This settlement was occupied by the British during the war of 1812, but at the conclusion of peace was restored to the United States, in conformity with the requirements of the treaty. In addition to these acts of discovery and occupation the United States, by the treaty of February 22, 1819, acquired from Spain all her rights to territory on the Pacific north of the 42d parallel of north latitude.

On this foundation the United States based its claim to Oregon, a claim which was disputed by Great Britain. The territory in dispute was bounded, according to the claim of the United States, by the 42d parallel of north latitude on the south, by the line of 54° 40' on the north, and by the Rocky or Stony Mountains on the east. It embraced, roughly speaking, an area of 600,000 square miles. By the treaty of June 15, 1846, the dispute between the United States and Great Britain was terminated by a nearly equal division of the territory. By the first article of this treaty the boundary was continued westward along the 49th parallel of north latitude "to the middle of the channel which separates the continent from Vancouver's Island; and thence southerly through the middle of the said channel, and of Fuca's Straits, to the Pacific Ocean: Provided, however, that the navigation of the whole of the said channel and straits, south of

the 49th parallel of north latitude, remain free and open to both parties."

For a full history of the dispute and its settlement, and of the grounds of fact and of law involved therein, see Moore, *Int. Arbitrations*, I. chaps. vii. and viii. See, also, Wheaton, *Int. Law*, Dana's ed. 250; Twiss, *The Oregon Territory*.

As to San Juan Island, see H. Ex. Doc. 77, 36 Cong. 1 sess.; S. Ex. Doc. 10, 36 Cong. 1 sess.; S. Ex. Doc. 29, 40 Cong. 2 sess.

#### 6. CALIFORNIA AND NEW MEXICO.

#### § 105.

After the annexation of Texas to the United States, the boundary between the United States and Mexico, as defined in the treaty between the United States and Spain of 1819, was further changed by the treaty of peace concluded at Guadalupe Hidalgo, February 2, 1848, under which California and New Mexico, which had been occupied by the American forces during the war, passed to the United States, the latter paying to Mexico \$15,000,000, and in addition assuming the payment of claims of citizens of the United States against Mexico to an amount not exceeding \$3,250,000. By Art. V. of the treaty, the new line was defined as follows:

"The boundary line between the two Republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New Mexico; thence, westwardly, along the whole southern boundary of New Mexico (which runs north of the town called Paso) to its western termination; thence, northward, along the western line of New Mexico, until it intersects the first branch of the river Gila; (or if it should not intersect any branch of that river, then to the point on the said line nearest to such branch, and thence in a direct line to the same;) thence down the middle of the said branch and of the said river, until it empties into the Rio Colorado; thence across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean.

"The southern and western limits of New Mexico, mentioned in this article, are those laid down in the map entitled 'Map of the United Mexican States, as organized and defined by various acts of the Congress of said Republic, and constructed according to the best authorities. Revised edition. Published at New York, in 1847, by J. Disturnell;' of which map a copy is added to this treaty, bearing the signatures and seals of the undersigned Plenipotentiaries. And, in

order to preclude all difficulty in tracing upon the ground the limit separating Upper from Lower California, it is agreed that the said limit shall consist of a straight line drawn from the middle of the Rio Gila, where it unites with the Colorado, to a point on the coast of the Pacific Ocean, distant one marine league due south of the southernmost point of the port of San Diego, according to the plan of said port made in the year 1782 by Don Juan Pantoja, second sailing-master of the Spanish fleet, and published at Madrid in the year 1802, in the atlas to the voyage of the schooners *Sutil* and *Mexicana*; of which plan a copy is hereunto added, signed and sealed by the respective Plenipotentiaries."

May 13, 1846, "Congress declared in the preamble of the act providing for the prosecution of the war with Mexico that 'by the act of the Republic of Mexico a state of war exists between that Government and the United States,'<sup>a</sup> and on the same day President Polk made proclamation of that fact.<sup>b</sup> While hostilities were going on Nicholas P. Trist, Chief Clerk of the Department of State, was dispatched to Mexico, and opened negotiations for peace.<sup>c</sup> He was instructed to demand the cession of New Mexico and California in satisfaction of claims against Mexico.<sup>d</sup> . . . The proposals were rejected by Mexico, and the commissioner was recalled on the 6th of October, 1847. He remained, however, in Mexico, notwithstanding the instructions to return, and he succeeded in concluding the treaty of Guadalupe Hidalgo on the 2d of February, 1848. This was communicated to the Senate on the 23d of February.<sup>e</sup> Sundry amendments were made by the Senate and accepted by Mexico, and the ratifications were exchanged on the 30th of May, 1848. . . . On the 6th of July, 1848, the President communicated the treaty to Congress, with a message asking legislation to carry it into effect." (S. Ex. Doc. 60, 30 Cong. 1 sess.)

Davis, Notes, Treaty Volume (1776-1887), 1355-1356. The learned author also cites, in connection with the war and the treaty of peace, S. Doc. 337, 29 Cong. 1 sess.; H. Ex. Doc. 196, 29 Cong. 1 sess.; S. Ex. Doc. 1, 29 Cong. 2 sess.; S. Ex. Doc. 107, 29 Cong. 2 sess.; S. Ex. Docs. 20 & 52, 30 Cong. 1 sess.; H. Ex. Docs. 40, 56, and 60, 30 Cong. 1 sess.; S. Ex. Doc. 32, 31 Cong. 1 sess.

See, as to the claims against Mexico and their settlement, Moore, *Int. Arbitrations*, II. 1247-1255; 9 Stats. 94, 265, 393, 617; S. Ex. Doc. 34, 32 Cong. 1 sess.

See, as to the annexation of Texas, "The United States and Mexico," by Edward G. Bourne, *The Am. Hist. Rev.* V. (April, 1900), 491; *Ann. Report of the Am. Hist. Assoc.* 1899, I. 155.

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<sup>a</sup> 9 Stats. 9.

<sup>b</sup> 9 Stats. 999.

<sup>c</sup> S. Ex. Doc. 20, 30 Cong. 1 sess.

<sup>d</sup> S. Ex. Doc. 1, 30 Cong. 1 sess. 7. President's Annual Message.

<sup>e</sup> S. Ex. Doc. 52, 30 Cong. 1 sess.

No treaty or convention is found granting the use of Pichilique Island and Bay to the United States as a coaling station. The privilege of such use seems originally to have been granted by Governor Pedrera, of Lower California, in a communication to Mr. Elmer, United States consul at La Paz, Dec. 3, 1866. Jan. 21, 1868, Governor Galvan, of the same province, wrote to Mr. Elmer: "Coal may continue to be deposited at Pichilique for the exclusive use of your war vessels until the Supreme Government may otherwise dispose." Dec. 27, 1867, the Mexican Secretary of State informed Mr. Plumb, United States chargé d'affaires in Mexico, that the General Government, assuming the unauthorized grant of the governor of Lower California, had issued orders forbidding the collection of duties upon the coal already deposited and directing that coal intended for vessels of war of the United States be allowed at any chosen point in the port of La Paz, or the adjacent port of Pichilique, without paying duty of any kind. (Mr. Olney, Sec. of State, to Sec. of Navy, Oct. 18, 1895, 205 MS. Dom. Let. 392, inclosing copy of a dispatch from Mr. Elmer to Mr. Seward, Dec. 16, 1866.)

#### 7. THE MESILLA VALLEY.

#### § 106.

By the convention concluded at Mexico Dec. 30, 1853, by James Gadsden, on the part of the United States, and the secretary of foreign relations and two scientific commissioners, on the part of Mexico, the latter power, in consideration of the sum of 10,000,000 dollars, released the United States from any liability on account of certain stipulations of the treaty of 1848, touching the incursions of savage tribes, and made a further cession of territory; and it was agreed (Art. I.) that the boundary should be as follows:

"The Mexican Republic agrees to designate the following as her true limits with the United States for the future: Retaining the same dividing line between the two Californias as already defined and established, according to the 5th article of the treaty of Guadalupe Hidalgo, the limits between the two republics shall be as follows: Beginning in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, as provided in the fifth article of the treaty of Guadalupe Hidalgo; thence, as defined in the said article, up the middle of that river to the point where the parallel of  $31^{\circ} 47'$  north latitude crosses the same; thence due west one hundred miles; thence south to the parallel of  $31^{\circ} 20'$  north latitude; thence along the said parallel of  $31^{\circ} 20'$  to the 111th meridian of longitude west of Greenwich; thence in a straight line to a point on the Colorado River twenty English miles below the junction of the Gila and Colorado rivers; thence up the middle of the said river Colorado until it intersects the present line between the United States and Mexico. . . .

"In consequence, the stipulation in the 5th article of the treaty of Guadalupe upon the boundary line therein described is no longer of any force, wherein it may conflict with that here established, the said

line being considered annulled and abolished wherever it may not coincide with the present, and in the same manner remaining in full force where in accordance with the same."

By conventions of July 29, 1882, February 18, 1889, and August 24, 1894, provision was made for the relocation, by an International Boundary Commission, of the line under the treaties of 1848 and 1853, in places where the monuments of prior surveys had been destroyed or displaced.

By another series of conventions, provision has been made for the examination and decision, by an International Boundary Commission, of all questions growing out of changes, either from natural or from artificial causes, in the channels of the Rio Grande and Rio Colorado, where they form the boundary. The conventions in question were concluded November 12, 1884; March 1, 1889; October 1, 1895; November 6, 1896; October 29, 1897; December 2, 1898.

"One of the causes [of the conclusion of the treaty of Dec. 30, 1853], it is evident to the umpire, was the complaints constantly made by the Mexican Government to that of the United States, from an early date after the conclusion of the treaty of Guadalupe Hidalgo till near the end of 1853, that the stipulations of the 11th article of that treaty [relating to the prevention of Indian incursions] had not been fulfilled by the latter Government and that it consequently owed indemnity both to the Mexican Government and to citizens of Mexico, on account of the damages incurred through this failure. The correspondence between the two Governments was of an irritating nature and seemed likely to excite angry feelings on both sides. It was therefore the interest, as it was the desire, of both Governments to put an end to this state of their relations, and the umpire can not doubt that this was one of the causes of disagreement which were referred to in the preamble of the treaty of 1853, and which the two nations desired to remove. . . .

"By the unratified treaty of 1853, as negotiated by Mr. Gadsden in Mexico, that Republic ceded to the United States a certain portion of territory and agreed that the 11th article of the treaty of Guadalupe Hidalgo should be annulled, and that the United States should be exonerated from all claims by Mexico or Mexican citizens, whether on account of the alleged failure to fulfill the obligations of the 11th article of the treaty of Guadalupe Hidalgo or on other accounts, which might have arisen since the date of that treaty. In consideration of these stipulations the United States agreed to pay fifteen millions of dollars and further agreed to assume all claims of United States citizens against Mexico and to pay them to the extent of five millions. .

"But the Senate of the United States altered the terms of this treaty, and the amendments proposed by that body were accepted by Mexico. By the amended treaty Mexico ceded a smaller portion of territory, released the United States from all liability on account of

the obligations contained in the 11th article of the treaty of Guadalupe Hidalgo, and agreed that that article and the 33rd article of the treaty of the 5th of April 1831 should be annulled. In this amended treaty no mention is made of the miscellaneous claims of Mexican citizens against the United States nor of those of United States citizens against Mexico.

"In consideration of these stipulations, i. e., the cession of a smaller portion of territory, the release of the United States from all liability on account of the obligations contained in the 11th article of the treaty of Guadalupe Hidalgo, and the repeal of that article and of the 33rd article of the treaty of April 5th, 1831, the United States agreed to pay to Mexico the sum of ten millions of dollars."

Sir Edward Thornton, umpire, case of *Rafael Aguirre v. U. S.*, No. 131, Mex. Claims Com., treaty of July 4, 1868, Int. Arbitrations, III. 2444; see, also, 2430-2447; Ex. Docs. 31 Cong. 1 sess., I. 426; S. Docs. 33 Cong. 1 sess., I. 256, 363, 434; S. Docs. 33 Cong. 2 sess., 366-385.

Article XXXIII. of the treaty of 1831, referred to by Sir Edward Thornton, also related to the restraint of savage tribes.

Differences had also arisen between the two countries in the running of the boundary under the treaty of Guadalupe Hidalgo. These differences involved the control of the Mesilla Valley, and as incidents of this the establishment of a safe frontier against the Indians and of a feasible route for a railway near the Gila River. Mr. Gadsden's instructions embraced both the boundary question and that of the Indian depredation claims. He presented his credentials August 17, 1853. The correspondence was opened by Mr. Bonilla in a note of August 30, 1853, in relation to the depredation claims. Mr. Gadsden replied on the 9th of September. See, further, Mr. Bonilla to Mr. Gadsden, October 18, 1853; Mr. Gadsden to Mr. Bonilla, November 14 and November 29, 1853; General Almonte, Mexican minister at Washington, to Mr. Marcy, Secretary of State, October 22, 1853; Mr. Marcy to General Almonte, December 22, 1853. After the ratification of the treaty by the Senate the following correspondence took place: General Almonte to Mr. Marcy, May 4, June 21, and June 29, 1854; Mr. Marcy to General Almonte, May 5, June 20, and June 24, 1854. (MSS. Dept. of State.)

Owing to the uncertain situation of affairs at the time in Mexico, it was deemed prudent not to intrust written instructions even in the hands of a special messenger, and Mr. Samuel Ward was sent to Mr. Gadsden with oral instructions. (Mr. Marcy, Secretary of State, to Mr. Gadsden, No. 20 (confidential), January 6, 1854, MS. Inst. Mexico, XVI. 442.)

#### 8. ALANKA.

#### § 107.

Sept. 7, 1821, the Emperor Alexander of Russia issued a ukase by which he gave his sanction to certain regulations of the Russian-American Company respecting foreign commerce in the waters bordering on its establishments. "From the tenor of the ukase," said Mr. John Quincy Adams, "the pretensions

Ukase of 1821.



of the Imperial Government extend to an exclusive territorial jurisdiction from the forty-fifth degree of north latitude, on the Asiatic coast, to the latitude of fifty-one north on the western coast of the American continent; and they assume the right of interdicting the *navigation* and the fishery of all other nations to the extent of one hundred miles from the whole of that coast. The United States can admit no part of these claims." In regard to territorial claims, Mr. Adams said that the right of the United States from the forty-second to the forty-ninth parallel of north latitude on the Pacific Ocean was considered unquestionable, and that the Government was willing to agree to 55° north latitude as a boundary line.<sup>a</sup>

April 17/5, 1824, Mr. Middleton, then minister of the United States at St. Petersburg, concluded with Count Nesselrode and Mr. Poletica, as representatives of the Russian Government, a convention by which the questions between the two Governments as to territory and navigation were adjusted. By the first three articles, which were permanent in their nature, it was in substance provided that there should be no interference with navigation or fishing, or with resort to unoccupied coasts, in any part of the Pacific Ocean, and that the dividing line between the territorial claims of the United States and Russia on the northwest coast of America should be the parallel of 54° 40' north latitude. Above that line Russia was left by the United States to contest the territory with Great Britain; below it the United States was left by Russia to carry on a similar contention with the same power. The subject of commercial intercourse was adjusted, temporarily, by Articles IV. and V. of the convention. By these articles it was provided that, for a term of ten years from the date of the signature of the convention, the ships of both powers might "reciprocally frequent, without any hindrance whatever, the interior seas, gulfs, harbors, and creeks" on the northwest coast of America for the purpose of fishing and of trading with the natives; but from the commerce thus permitted it was stipulated that all spirituous liquors, firearms, other arms, powder, and munitions of war of every kind should always be excepted, each of the contracting parties reserving to itself the right to enforce this restriction upon its own citizens or subjects.<sup>b</sup> When the commercial privilege thus secured came to an end, the Russian Government refused to renew it, alleging that it had been abused.<sup>c</sup> But under the most-favored-nation clause contained in Art. XI. of the treaty of commerce and navigation between the United

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<sup>a</sup>Mr. Adams, Sec. of State, to Mr. Middleton, min. to Russia, July 22, 1823, Am. State Papers, For. Rel. V. 436 et seq.; Int. Arbitrations, I. 760.

<sup>b</sup>Am. State Papers, For. Rel. V. 432-471, contains the correspondence relating to the convention.

<sup>c</sup>S. Ex. Doc. 1, 25 Cong. 3 sess. 25-26, 70; Davis, Notes, Treaty Volume (1776-1887), 1380.

States and Russia of Dec. 18, 1832, citizens of the United States enjoyed on the Russian coasts the same privileges of commerce as were secured by treaty to British subjects.

Questions between Great Britain and Russia, growing out of the ukase of 1821, were adjusted by a convention between those powers, signed at St. Petersburg Feb. 28/16, 1825. In regard to the rights of navigation and fishing, and of landing on the coasts, its provisions were substantially the same as those of the convention between Russia and the United States. It also defined the boundary between the British and the Russian possessions. As to commerce, it secured, for the space of ten years, the enjoyment of substantially the same privileges as were contained in the convention with the United States. These privileges were renewed by Art. XII. of the treaty between Great Britain and Russia of January 11, 1843.

"All the territory and dominion" possessed by His Majesty the Emperor of Russia "on the continent of America and the adjacent islands" were transferred to the United States, in consideration of the sum of \$7,200,000, by the treaty signed at Washington March 30, 1867.

The treaty "was communicated to Congress on the 6th of July, 1867, with a request for necessary legislation."<sup>a</sup> The steps taken in the actual transfer of the ceded territory are set forth in the President's message of January 27, 1868.<sup>b</sup> A copy of the treaty of cession, and of the correspondence relating to it, and other correspondence, with 'Information in Relation to Russian America,' including Mr. Sumner's speech, was communicated to the House on the 17th of February, 1868.<sup>c</sup> The subject of the appropriation to carry out this treaty was discussed at length in the House.<sup>d</sup> . . . The act was at last passed on the 27th of July."

Davis's Notes, United States Treaty Vol. (1776-1887), 1380; House Report 37, 40 Cong. 2 sess.; 15 Stats. 198.

In H. Ex. Doc. 177, 40 Cong. 2 sess., p. 12, there is a dispatch to Mr. Seward from Mr. Cassius M. Clay, then minister to Russia, May 10, 1867, saying: "I congratulate you upon this brilliant achievement which adds so vast a territory to our Union; . . . My attention was first called to this matter in 1863, when I came over the Atlantic with the Hon. Robert J. Walker. . . . He told me that the Emperor Nicholas was willing to give us Russian America if we would close up our coast possessions to 54° 40'. But the slave interest, fearing this new accession of 'free soil,' yielded the point and let England into the great ocean."

<sup>a</sup>S. Ex. Doc. 17, 40 Cong. 1 sess.

<sup>b</sup>H. Ex. Doc. 125, 40 Cong. 2 sess. This document contains the report of Gen. Rousseau, who was sent as agent to receive the transfer of the territory, together with the schedules and agreements of the commissioners relating to such transfer.

<sup>c</sup>H. Ex. Doc. 177, 40 Cong. 2 sess., parts 1 and 2.

<sup>d</sup>Cong. Globe, 40 Cong., 2 sess.

At page 46 of the same document there is an article, reprinted from the New York Herald of April 29, 1867, in which it is stated that in 1854, during the Crimean war, the Russian Government, through Baron Stoeckl, formally proposed the sale of the whole of Russian America to the United States.

For a review of the proceedings in Congress on the passage of the act of July 27, 1868, see Magoon's Reports, 151.

For recommendations as to the government of the territory, see President McKinley's first and third annual messages, Dec. 6, 1897, and Dec. 5, 1899.

"My serious thoughts about acquiring Russian America were effectively reinforced by the letter which you wrote me in regard to the fisheries of that region in January, 1866."

Mr. Seward, Sec. of State, to Mr. Joseph L. McDonald, Steilacoom, Pierce City, Washington Territory, Aug. 26, 1867, 78 MS. Dom. Let. 29.

"In your letter of the 26th ultimo you say that you have seen it stated in a Sitka paper that 'the seven million that we were supposed to have paid for Alaska was really given to Russia to pay the expenses of her friendly naval demonstration made during the Civil War to counteract the supposed hostile intention of England and France; that Russia's *amour propre* forbade her to receive and receipt for the money as paid for the above services, but she ceded to us Alaska, which she no longer wanted, and it was made to appear that Alaska was bought and sold.' You desire to be informed of the correctness of the statements as you expect to deliver a lecture on the subject of Alaska. In reply, I have to say that no confirmation of these statements is found on record in this Department. Alaska was duly paid for and the receipt of the stipulated payment acknowledged by Russia." (Mr. Rives, Assist. Sec. of State, to Mr. Higbee, Jan. 5, 1889, 171 MS. Dom. Let. 244.)

See, as to the history of the negotiations, Scidmore's Alaska, 201 et seq. This work states (p. 314) that the Alaska Commercial Company, from 1870 to 1884, paid the United States, under its lease of the seal islands, \$4,662,026, in amounts ranging from \$262,500 to \$317,000 a year.

By Art. III. of the treaty of cession, the inhabitants are guaranteed the "free enjoyment" of their religion. Under this stipulation, "members of the Orthodox Greek Church in Alaska enjoy the same religious freedom as do members of other religious bodies. Equality of treatment is all that can be fairly demanded, the treaty does not bind the United States to more."

Mr. Adee, Acting Sec. of State, to Mr. Breckinridge, Nov. 3, 1894, MS. Inst. Russia, XVII. 285; Prince Cantacuzene, Russ. min., to Mr. Gresham, Sec. of State, April 3, 1894, MSS. Dept. of State; Mr. Gresham, Sec. of State, to Prince Cantacuzene, April 13, 1894, MS. Notes to Russia, VIII. 46.

See, as to the admission of certain wines for the Greek churches in Alaska, Mr. Bayard, Sec. of State, to Mr. Endicott, March 17, 1885, 154 MS. Dom. Let. 511, inclosing copy of a note from Mr. de Struve, Russ. min., of March 12, 1885.

Mr. Sherman, Secretary of State, in a note to the Russian legation of March 11, 1897, stated that the agent of the Treasury Department on the Pribiloff Islands would be instructed to permit the duly accredited representatives of the Greek Church in Alaska to land on those islands whenever they might so desire, subject to the discontinuance of the permission whenever, in the judgment of the resident agent, such discontinuance might be necessary to the best interests of the United States Government. The captains of revenue cutters would also be instructed to grant them free transportation between Unalaska and the islands, subject to the free movement of the vessels. It was stated, however, that the Treasury Department was not prepared to give a definite answer to the request that the priests be permitted to teach the gospel in the school conducted by the North-American Commercial Company under its contract with the Treasury Department, on Saturdays and Sundays, if not on other days in the week. (Mr. Sherman, Sec. of State, to Mr. de Kotzébue, March 11, 1897, For. Rel. 1897, 436. See, also, Mr. Sherman, Sec. of State, to Sec. of the Treasury, Feb. 7, 1898, 225 MS. Dom. Let. 295.)

Of the territory thus ceded, the easterly boundary, as established by the convention between Great Britain and Russia of Feb. 28/16, 1825, and therefrom incorporated into the treaty of cession, is (the French being the official text, of which the English is merely a translation) as follows:

*III. La ligne de démarcation entre les Possessions des Hautes Parties Contractantes sur la Côte du Continent et les Îles de l'Amérique Nord Ouest, sera tracée ainsi qu'il suit:—*

*A partir du Point le plus méridional de l'Île dite Prince of Wales, lequel Point se trouve sous la parallèle du 54<sup>me</sup> degré 40 minutes de latitude Nord, et entre 131<sup>me</sup> et le 133<sup>me</sup> degré de longitude Ouest (Méridien de Greenwich), la dite ligne remontera au Nord le long de la passe dite Portland Channel, jusqu'au Point de la terre ferme où elle atteint le 56<sup>me</sup> degré de latitude Nord: de ce dernier point la ligne de démarcation suivra la crête des montagnes situées parallèlement à la Côte, jusqu'au point d'intersection du 141<sup>me</sup> degré de longitude Ouest (même Méridien); et, finalement, du dit point d'intersection, la même ligne méridienne du 141<sup>me</sup> degré formera, dans son prolongement jusqu'à la mer Glaciale, la limite entre les Possessions Russes et Britanniques sur le Continent de l'Amérique Nord Ouest.*

III. The line of demarcation between the Possessions of the High Contracting Parties upon the Coast of the Continent and the Islands of America to the North-West, shall be drawn in the following manner:

Commencing from the southernmost point of the Island called Prince of Wales Island, which point lies in the parallel of 54 degrees 40 minutes, North Latitude, and between the 131st and 133d Degree of West Longitude (Meridian of Greenwich), the said line shall ascend to the North along the Channel called Portland Channel, as far as the Point of the Continent where it strikes the 56th Degree of North Latitude; from this last mentioned Point the line of demarcation shall follow the summit of the mountains situated parallel to the coast, as far as the point of intersection of the 141st Degree of West Longitude (of the same Meridian); and, finally, from the said point of intersection, the said Meridian Line of the 141st Degree, in its prolongation as far as the Frozen Ocean, shall form the limit between the Russian and British Possessions on the Continent of America to the North West.

IV. Il est entendu, par rapport à la ligne de démarcation déterminée dans l'Article précédent:

1. Que l'île dite Prince of Wales appartiendra toute entière à La Russie:

2. Que partout où la crête des montagnes qui s'étendent dans une direction parallèle à la Côte depuis le 56<sup>me</sup> degré de latitude Nord au point d'intersection du 141<sup>me</sup> degré de longitude Ouest, se trouverait à la distance de plus de dix lieues marines de l'Océan, la limite entre les Possessions Britanniques et la lisière de Côte mentionnée ci-dessus comme devant appartenir à La Russie, sera formée par une ligne parallèle aux sinuosités de la Côte, et qui ne pourra jamais en être éloignée que de dix lieues marines.

IV. With reference to the line of demarcation laid down in the preceding Article, it is understood:

1st. That the Island called Prince of Wales Island shall belong wholly to Russia.

2d. That wherever the summit of the mountains which extend in a direction parallel to the Coast, from the 56th degree of North Latitude to the point of intersection of the 141st degree of West Longitude, shall prove to be at the distance of more than ten marine leagues from the Ocean, the limit between the British Possessions and the line of Coast which is to belong to Russia, as above mentioned, shall be formed by a line parallel to the windings of the Coast, and which shall never exceed the distance of ten marine leagues therefrom.<sup>a</sup>

The line thus established has not been surveyed and marked, and, as to the section from 54° 40' to Mount St. Elias, there is a controversy as to where it should run. Great Britain, construing, according to the Canadian contention, the word "coast" so as to make it applicable to the adjacent islands rather than to the mainland, has claimed a considerable strip of territory on tidewater, together with numerous islands, in whole or in part. The United States, on the contrary, maintains that the coast whose windings the line is to follow is the coast of the mainland, and that the "lisière de Côte" is a continuous strip of the same coast. This position is based not only upon the text of the convention of 1825 but also upon authentic historical facts.<sup>b</sup>

By a convention of July 22, 1892, provision was made for the coincident or joint survey, as might be found convenient, of this line. The time for the performance of the work was extended by a conven-

<sup>a</sup> It was further provided by the British-Russian convention of 1825 (Art. V.) that neither party should form establishments within the limits thus assigned to the other, and specifically, that British subjects should not form any establishment, "either upon the coast, or upon the border of the continent (*soit sur la côte, soit sur la lisière de terre ferme*) comprised within the limits of the Russian possessions."

<sup>b</sup> The Alaskan Boundary, by Hon. John W. Foster, National Geographic Mag., X. 425; the Alasko-Canadian Frontier, by Thomas Willing Balch (Philadelphia: Allen, Lane & Scott, 1902); the Alaskan Boundary, by J. B. Moore, N. Am. Rev., vol. 169, p. 501. Correspondence, previously unpublished, showing incidentally the mutual understanding of Great Britain and Russia as to the line in the treaty of 1825, was disclosed in 1893, among the papers accompanying the British case before the tribunal of arbitration at Paris. (Fur Seal Arbitration, American reprint, IV. 365-449.) See, also, Report of the Select Committee on the Hudson's Bay Company, 1857, pp. 140, 1391.

tion of Feb. 3, 1894, till Dec. 31, 1895. Surveys and reports were duly made.<sup>a</sup>

By an exchange of notes October 20, 1899, by Mr. Hay, Secretary of State, and Mr. Tower, British chargé at Washington, a provisional boundary was established about the head of Lynn Canal, as follows:

“It is hereby agreed between the Governments of the United States and of Great Britain that the boundary line between Canada and the territory of Alaska in the region about the head of Lynn Canal shall be provisionally fixed as follows without prejudice to the claims of either party in the permanent adjustment of the international boundary:

“In the region of the Dalton Trail, a line beginning at the peak west of Porcupine Creek, marked on the map No. 10 of the United States Commission, December 31, 1895, and on sheet No. 18 of the British Commission, December 31, 1895, with the number 6500; thence running to the Klehini (or Klahela) River in the direction of the peak north of that river, marked 5020 on the aforesaid United States map and 5025 on the aforesaid British map; thence following the high or right bank of the said Klehini River to the junction thereof with the Chilkat River, a mile and a half, more or less, north of Klukwan; provided that persons proceeding to or from Porcupine Creek shall be freely permitted to follow the trail between the said creek and the said junction of the rivers, into and across the territory on the Canadian side of the temporary line wherever the trail crosses to such side, and, subject to such reasonable regulations for the protection of the revenue as the Canadian Government may prescribe, to carry with them over such part or parts of the trail between the said points as may lie on the Canadian side of the temporary line, such goods and articles as they desire, without being required to pay any customs duties on such goods and articles; and from said junction to the summit of the peak east of the Chilkat River, marked on the aforesaid map No. 10 of the United States Commission with the number 5410 and on the map No. 17 of the aforesaid British Commission with the number 5490.

“On the Dyea and Skagway trails, the summits of the Chilcoot and White passes.

“It is understood, as formerly set forth in communications of the Department of State of the United States, that the citizens or subjects

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<sup>a</sup>Mr. Adee, Acting Sec. of State, to Mr. Underwood, Aug. 3, 1897, 220 MS. Dom. Let. 56. The following documents, profusely illustrated with maps, relate to this part of the boundary: S. Ex. Doc. 143, 49 Cong. 1 sess.; S. Ex. Doc. 146, 50 Cong. 2 sess.

A treaty was signed Jan. 30, 1897, for marking that part of the boundary which follows the 141st meridian from Mt. St. Elias to the Frozen Ocean, but it has remained unratified. (Mr. Adee, Acting Sec. of State, to Mr. Underwood, Aug. 3, 1897, 220 MS. Dom. Let. 56.)

of either Power, found by this arrangement within the temporary jurisdiction of the other, shall suffer no diminution of the rights and privileges which they now enjoy.

“The Government of the United States will at once appoint an officer or officers in conjunction with an officer or officers to be named by the Government of Her Britannic Majesty, to mark the temporary line agreed upon by the erection of posts, stakes, or other appropriate temporary marks.”

For the correspondence relating to the conclusion of this agreement, see For. Rel. 1899, 320-332.

“The President has referred to me, after acknowledgment in regular course, your letter of the 11th ultimo, with which was enclosed a protest of the miners of the Porcupine mining district of Alaska against the provisional demarcation of the boundary in the vicinity of the Klebeni River, which has been recently made in virtue of the *modus vivendi* concluded on the 20th of October last.

“The arguments and statements presented in the petition with great clearness were fully understood here, and the circumstance that the negotiation of a *modus* was prolonged for some two years before an agreement was reached was due to the insistence of this Government that no solution was admissible which should not recognize and guard all rights and privileges gained by the American miners and other citizens who had settled in the disputed territory. This position was assumed very early in the negotiation, after consultation with representative Senators and Congressmen, especially from the Pacific and Northwestern States, and it was well understood that our demand that the American citizens who, by the operation of any provisional arrangement might be found within the temporary jurisdiction of Great Britain, should suffer no diminution of their existing rights, was an essential condition from which no recession was possible. The other details of the arrangement were in like manner the subject of constant consultation with the best informed representative authorities, throughout the negotiation, and were generally and fully acquiesced in, with a clear realization of the fact that a settlement of the character sought to be reached was necessarily a temporary compromise, involving mutual concessions, although without prejudice to the complete establishment of the rights of either party in the eventual permanent adjustment of the treaty boundary.

“I enclose for your information a copy of the *modus vivendi* of October 20, 1899. I beg you to observe:

“First: That the arrangement is provisional merely and without prejudice to the claims of either party in the permanent adjustment of the international boundary.

“Second: That the inconvenience of a provisional line crossing and recrossing the shifting water-way was foreseen and expressly provided

for by the engagement 'that persons proceeding to or from Porcupine Creek shall be freely permitted to follow the trail between the said creek and the said junction of the rivers (Klehini and Chilkat) into and across the territory on the Canadian side of the temporary line whenever the trail crosses to such side, and, subject to such reasonable regulations for the protection of the Revenue as the Canadian Government may prescribe, to carry with them over such part or parts of the trail between the said points as may lie on the Canadian side of the temporary line, such goods and articles as they desire, without being required to pay any customs duties on such goods and articles.'

"Thirdly (and most importantly in its relation to the grounds of your protest): That it is stipulated 'that the citizens or subjects of either Power, found by this arrangement within the temporary jurisdiction of the other, shall suffer no diminution of the rights and privileges which they now enjoy.'

"The provisional arrangement so entered into by the United States and Great Britain was made public in October last, so that its provisions became widely known to all parties interested, affording ample opportunity to foresee its effects when the officers of the two Governments should have completed the mechanical operation of marking the temporary line agreed upon by the erection of posts, stakes, or other appropriate temporary marks. To enable a full understanding in these particulars, the published copies of the *modus vivendi* were accompanied by a map, carefully prepared from the latest and most authentic sources. The arrangement and the map were printed in nearly all the newspapers at the time, constituting an abundant public notification. It would seem, therefore, that the recent action of the surveyors named by the two Governments in setting up the prescribed marks can not be deemed a surprise. Neither does their action involve any new procedure or compromise amounting to an alteration of the engagement entered into in October last. The surveyors had no discretionary powers as to the subject-matter of the boundary dispute, their sole function being to mark, upon the surface of the ground, the provisional line upon which the two Governments had reached a compromise for the time being.

"The rights of the United States in the matter of the treaty boundary are absolutely intact, and their assertion in due time will be earnest and thorough. In the meantime, this Government foregoes no part of its right and power to protect its citizens in the Porcupine Creek region, whether they be temporarily within American or British jurisdiction, in the full enjoyment of all rights and privileges which they had before the *modus* was concluded, and to see that their freedom of access and exit, with their goods, is not unreasonably impeded."

Mr. Hay, Sec. of State, to Mr. Emmons, chairman of a committee of miners, Porcupine mining district, Alaska, August 3, 1900, 246 MS. Dom. Letters, 672; For. Rel. 1899, 331.



See, also, Mr. Adee, Acting Sec. of State, to Mr. Fitzpatrick, Sept. 10, 1900, 247 MS. Dom. Let. 564; Mr. Hay, Sec. of State, to Mr. Shattuck, Oct. 4, 1900, 248 MS. Dom. Let. 231.

As to customs regulations, see Mr. Day, Assist. Sec. of State, to the Sec. of the Treasury, March 21, 1898, 226 MS. Dom. Let. 579; Mr. Moore, Acting Sec. of State, to the Sec. of the Treasury, April 28, 1898, 228 MS. Dom. Let. 107.

As to postal regulations, see Mr. Hay, Sec. of State, to the Postmaster-General, March 15, 1900, 243 MS. Dom. Let. 618.

As to regulations concerning the issuance of miners' certificates in the North-West Territory, see note of British ambassador of April 25, 1898, MS. Notes from Great Britain.

The following official utterances and documents in relation to the boundary question may be cited:

"The frontier line between Alaska and British Columbia, as defined by the treaty of cession with Russia, follows the demarkation assigned in a prior treaty between Great Britain and Russia. Modern exploration discloses that this ancient boundary is impracticable as a geographical fact. In the unsettled condition of that region the question has lacked importance, but the discovery of mineral wealth in the territory the line is supposed to traverse admonishes that the time has come when an accurate knowledge of the boundary is needful to avert jurisdictional complications. I recommend, therefore, that provision be made for a preliminary reconnoissance by officers of the United States, to the end of acquiring more precise information on the subject. I have invited Her Majesty's Government to consider with us the adoption of a more convenient line, to be established by meridian observations or by known geographical features without the necessity of an expensive survey of the whole." (President Cleveland, annual message, Dec. 8, 1885.)

"The recommendation, submitted last year, that provision be made for a preliminary reconnoissance of the conventional boundary line between Alaska and British Columbia is renewed." (President Cleveland, annual message, Dec. 6, 1886.)

"The coastal boundary between our Alaskan possessions and British Columbia, I regret to say, has not received the attention demanded by its importance, and which on several occasions heretofore I have had the honor to recommend to the Congress.

"The admitted impracticability, if not impossibility, of making an accurate and precise survey and demarkation of the boundary line, as it is recited in the treaty with Russia under which Alaska was ceded to the United States, renders it absolutely requisite, for the prevention of international jurisdictional complications, that adequate appropriation for a reconnoissance and survey to obtain proper knowledge of the locality and the geographical features of the boundary should be authorized by Congress with as little delay as possible.

"Knowledge to be only thus obtained is an essential prerequisite for negotiation for ascertaining a common boundary, or as preliminary to any other mode of settlement." (President Cleveland, annual message, Dec. 3, 1888.)

"Provision should be made for a joint demarcation of the frontier line between Canada and the United States, wherever required by the increasing border settlements, and especially for the exact location of the water boundary in the straits and rivers." (President Harrison, annual message, Dec. 9, 1891.)

"Preliminary surveys of the Alaskan boundary . . . are in progress." (President Cleveland, annual message., Dec. 3, 1894.)

In a note of August 20, 1895, Lord Gough, British chargé, stated that Mr. William Ogilvie, who in 1887-88 conducted a survey of the country drained by the Yukon River and determined the point of intersection of the one hundred and forty-first meridian of longitude and the Yukon River, had been instructed to proceed with the determination of that meridian with all convenient speed. It was suggested that the United States either appoint a surveyor to act generally with Mr. Ogilvie, or that the demarcation of the line, which would be made on the ground by Mr. Ogilvie, should be provisionally recognized by both countries without prejudice to what might be determined by a joint delimitation. It was stated that a precedent for this second alternative occurred in 1877, when the boundary between the two countries on the Stikine River as surveyed by a Canadian officer, Mr. Joseph Hunter, was accepted by both countries on similar conditions. It was suggested that if the second alternative should be adopted the United States might be willing to share the cost of the preliminary survey. The United States suggested that the proposed survey be delayed until after Congress had had an opportunity to act upon the proposal for a joint survey and to make an appropriation therefor. (For. Rel. 1895, I. 723-724.)

"The completion of the preliminary survey of that Alaskan boundary which follows the contour of the coast from the southernmost point of Prince of Wales Island until it strikes the one hundred and forty-first meridian at or near the summit of Mount St. Elias awaits further necessary appropriation, which is urgently recommended. This survey was undertaken under the provisions of the convention entered into by this country and Great Britain July 22, 1892, and the supplementary convention of February 3, 1894.

"As to the remaining section of the Alaskan boundary, which follows the one hundred and forty-first meridian northwardly from Mount St. Elias to the Frozen Ocean, the settlement of which involves the physical location of the meridian mentioned, no conventional agreement has yet been made. The ascertainment of a given meridian at a particular point is a work requiring much time and careful observations and surveys. Such observations and surveys were undertaken by the United States Coast and Geodetic Survey in 1890 and 1891, while similar work in the same quarters under British auspices are believed to give nearly coincident results; but these surveys have been independently conducted and no international agreement to mark those or any other parts of the one hundred and forty-first meridian by permanent monuments has yet been made. In the meantime the valley of the Yukon is becoming a highway through the hitherto unexplored wilds of Alaska, and abundant mineral wealth has been discovered in that region, especially at or near the junction of the boundary meridian with the Yukon and its tributaries. In these circumstances it is expedient, and, indeed, imperative, that the jurisdictional limits of the respective Governments in this new region be speedily determined. Her Britannic Majesty's Government has proposed a joint delimitation of the one hundred and forty-first meridian by an international commission of experts, which, if Congress will authorize it and make due provision therefor, can be accomplished with no unreasonable delay. It is impossible to overlook the vital importance of continuing the work already entered upon, and supplementing it by further effective measures looking to the exact location of this entire boundary line." (President Cleveland, annual message, Dec. 2, 1895.)

"The undersigned, Secretary of State, to whom was referred on the 6th ultimo a resolution of the Senate, in the following terms:

"IN THE SENATE OF THE UNITED STATES,

"December 18, 1895.

"*Resolved*, That the President is requested, if not incompatible with the public interests, to communicate to the Senate all diplomatic correspondence and other information officially possessed by this Government, respecting the establishment or attempt to establish post routes by Great Britain or the Dominion of Canada over or upon United States territory in Alaska; also respecting the occupation or attempted occupation by any other means of any portion of such territory by the military or civil authorities of Great Britain or the Dominion of Canada; also respecting any other attempt by Great Britain or the Dominion of Canada to assert any claims to territory of the United States in Alaska"—

"Has the honor to report as follows:

"The Department of State is not officially possessed of any diplomatic correspondence or other information respecting the establishment of, or any attempt to establish, post routes by Great Britain or the Dominion of Canada over or upon United States territory in Alaska.

"Deeming it possible that the Postmaster-General might be able to impart some information touching this particular feature of the Senate's inquiry, I addressed a letter to Mr. Wilson on the subject. I inclose a copy of his reply, of January 31, 1896, from which it appears that one round trip by carrier was contemplated from Victoria, British Columbia, via Juneau, Alaska, to Fort Cudahy.

"The Department of State is not officially possessed of any authentic correspondence or other information respecting any occupation or attempted occupation, by other means than the establishment of post routes, of any portion of United States territory in Alaska by the military or civil authorities of Great Britain or the Dominion of Canada. The only diplomatic correspondence on file having even a remote relation to this branch of the Senate's inquiry was exchanged in June, 1895, when, at the instance of the Governor-General of Canada, the British ambassador at this capital asked that customs facilities be accorded a detachment of twenty mounted police en route for the Canadian section of the Yukon country, passing to its destination by way of Seattle, in the State of Washington, and St. Michaels, Alaska, and thence ascending the Yukon River to the boundary. The desired facilities were promptly accorded by the Secretary of the Treasury, and the British ambassador was so informed. Copies of the correspondence in question are appended.

"The Department of State is not officially possessed of any diplomatic correspondence or other information respecting any other attempt of Great Britain or the Dominion of Canada to assert any claims to territory of the United States in Alaska, either by occupation or attempt to occupy such territory or otherwise." (Report of Mr. Olney, Sec. of State, to the President, Feb. 10, 1896, accompanying the message of the President to the Senate of the same date, S. Doc. 112, 54 Cong. 1 sess.; For. Rel. 1895, I. 577.)

In For. Rel. 1896, 289-293, there is a correspondence concerning the delimitation of the one hundred and forty-first meridian between Alaska and the British-Canadian territory.

"A proposal for the immediate location of the Alaskan boundary line along the one hundred and forty-first meridian by setting international monuments thereon at or between convenient points already determined by

independent American and Canadian surveys, and by continuing its demarcation by joint survey, having been accepted, negotiations are in progress toward a convention with Great Britain or the organization of an international survey commission, as contemplated by the act approved February 20, 1896.

"The prospects of immediate negotiations for the precise demarcation of the coastwise Alaskan boundary are good. The preliminary survey of that region under the convention with Great Britain of July 22, 1892, was completed within the stipulated time, and, having before them the necessary topographical data, the two Governments are now in a position to consider and establish the boundary line in question according to the facts and agreeably to the true purpose of the treaties between Great Britain and Russia, and between Russia and the United States, whereby it is described." (Report of Mr. Olney, Sec. of State, to the President, Dec. 7, 1896; For. Rel. 1896, lxxiv.)

"In my last annual message I referred to the pending negotiations with Great Britain in respect to the Dominion of Canada. By means of an executive agreement a Joint High Commission had been created for the purpose of adjusting all unsettled questions between the United States and Canada, embracing twelve subjects, among which were the questions of the fur seals, the fisheries of the coast and contiguous inland waters, the Alaskan boundary, the transit of merchandise in bond, the alien labor laws, mining rights, reciprocity in trade, revision of the agreement respecting naval vessels in the Great Lakes, a more complete marking of parts of the boundary, provision for the conveyance of criminals, and for wrecking and salvage.

"Much progress had been made by the Commission toward the adjustment of many of these questions, when it became apparent that an irreconcilable difference of views was entertained respecting the delimitation of the Alaskan boundary. In the failure of an agreement as to the meaning of articles 3 and 4 of the treaty of 1825 between Russia and Great Britain, which defined the boundary between Alaska and Canada, the American Commissioners proposed that the subject of the boundary be laid aside and that the remaining questions of difference be proceeded with, some of which were so far advanced as to assure the probability of a settlement. This being declined by the British Commissioners, an adjournment was taken until the boundary should be adjusted by the two Governments. The subject has been receiving the careful attention which its importance demands, with the result that a *modus vivendi* for provisional demarcations in the region about the head of Lynn Canal has been agreed upon; and it is hoped that the negotiations now in progress between the two Governments will end in an agreement for the establishment and delimitation of a permanent boundary." (President McKinley, annual message, Dec. 5, 1899.)

"The work of marking certain provisional boundary points, for convenience of administration, around the head of Lynn Canal, in accordance with the temporary arrangement of October, 1899, was completed by a joint survey in July last. The *modus vivendi* has so far worked without friction, and the Dominion Government has provided rules and regulations for securing to our citizens the benefit of the reciprocal stipulation that the citizens or subjects of either power found by that arrangement within the temporary jurisdiction of the other shall suffer no diminution of the rights and privileges they have hitherto enjoyed. But however necessary such an expedient may have been to tide over the grave emergencies of the situation, it is at best but an unsatisfactory makeshift, which should not

be suffered to delay the speedy and complete establishment of the frontier line to which we are entitled under the Russo-American treaty for the cession of Alaska.

"In this relation I may refer again to the need of definitely marking the Alaskan boundary where it follows the one hundred and forty-first meridian. A convention to that end has been before the Senate for some two years, but as no action has been taken I contemplate negotiating a new convention for a joint determination of the meridian by telegraphic observations. These, it is believed, will give more accurate and unquestionable results than the sidereal methods heretofore independently followed, which, as is known, proved discrepant at several points on the line, although not varying at any place more than 700 feet." (President McKinley, annual message, Dec. 3, 1900.)

Mr. Hay, Secretary of State, in a report of April 24, 1902, as to alleged surveys and encroachments by British and Canadian officials on American territory near the border, stated that investigation of the allegations would be continued till the truth was ascertained. (H. Doc. 578, 57 Cong. 1 sess.)

See Mr. Hay, Sec. of State, to Mr. Choate, amb. to England, June 23, 1899, MS. Inst. Gr. Brit. XXXIII. 201.

The western boundary of Alaska, as defined in the treaty of cession (Art. I.), takes as a place of beginning "a point in Bering's Straits on the parallel of 65° 30' north latitude, at its intersection by the meridian which passes midway between the islands of Krusenstern or Ignalook and the island of Ratmanoff or Noonarbook." From this point the line in its upward course "proceeds due north, without limitation," into the "Frozen Ocean;" and, in its downward course, "beginning at the same initial point, proceeds thence in a course nearly southwest through Bering's Straits and Bering's Sea, so as to pass midway between the northwest point of the island of St. Lawrence and the southeast point of Cape Choukotski to the meridian of one hundred and seventy-two west longitude; thence from the intersection of that meridian in a southwesterly direction, so as to pass midway between the island of Attou and the Copper Island of the Kormandorski couplet or group, in the North Pacific Ocean, to the meridian of one hundred and ninety-three degrees west longitude, so as to include in the territory conveyed the whole of the Aleutian Islands east of that meridian."

#### 9. HAWAIIAN ISLANDS.

#### § 108.

September 19, 1820, John C. Jones was appointed to reside in the Hawaiian, then commonly called the Sandwich,

**Early relations.** Islands, as "agent of the United States for commerce and seamen."

In 1826 the islands were visited by Capt. Thomas ap Catesby Jones, commanding the U. S. S. *Peacock*, who was sent thither to adjust certain matters affecting the interests of American residents. He accomplished his mission successfully, and besides concluded the first treaty

formally negotiated with the Hawaiian king by the representative of a foreign power; but this treaty was not ratified by the United States.

In 1829 Captain Finch, of the U. S. S. *Vincennes*, who visited the islands, bearing presents and a letter written in the name of the President by the Secretary of the Navy, estimated the number of American vessels that called at the islands in the course of a year at one hundred, their aggregate tonnage at 35,000, and their value with their cargoes at upwards of \$5,000,000. All these vessels were concerned, in one way or another, with the pursuit of commerce in the East.

A treaty with the king of the islands was concluded by a British naval officer November 16, 1836. A treaty and a convention were concluded by a French naval officer in 1839.

Report of Mr. Allen, Chief of the Bureau of Rolls and Library of the Department of State, February 9, 1893, S. Ex. Doc. 77, 52 Cong. 2 sess.; For. Rel. 1894, App. II; Relation of the United States to Asiatic Politics, The Independent, May 4, 1899, 1206.

“The United States have regarded the existing authorities in the Sandwich Islands as a Government suited to the condition of the people, and resting on their own choice; and the President is of opinion that the interests of all commercial nations require that that Government should not be interfered with by foreign powers. Of the vessels which visit the islands, it is known that the great majority belong to the United States. The United States, therefore, are more interested in the fate of the islands and of their Government than any other nation can be; and this consideration induces the President to be quite willing to declare, as the sense of the Government of the United States, that the Government of the Sandwich Islands ought to be respected; that no power ought either to take possession of the islands as a conquest or for the purpose of colonization, and that no power ought to seek for any undue control over the existing Government, or any exclusive privileges or preferences with it in matters of commerce.”

Mr. Webster's letter, 1842.

Mr. Webster, Sec. of State, to Messrs. Haalilio and Richards, agents from Hawaii, Dec. 19, 1842, 6 Webster's Works, 478; H. Ex. Doc. 35, 27 Cong. 3 sess.; For. Rel. 1894, App. II. 44.

“Owing to their locality and to the course of the winds which prevail in this quarter of the world, the Sandwich Islands are the stopping place for almost all vessels passing from continent to continent across the Pacific Ocean.

President Tyler's message.

They are especially resorted to by the great numbers of vessels of the United States which are engaged in the whale fishery in those seas. The number of vessels of all sorts and the amount of property owned by citizens of the United States which are found in those islands in the course of a year are stated, probably with sufficient accuracy, in the letter of the agents.

“Just emerging from a state of barbarism, the Government of the islands is as yet feeble; but its dispositions appear to be just and pacific, and it seems anxious to improve the condition of its people by the introduction of knowledge, of religious and moral institutions, means of education, and the arts of civilized life.

“It can not but be in conformity with the interest and the wishes of the Government and the people of the United States that this community, thus existing in the midst of a vast expanse of ocean, should be respected, and all its rights strictly and conscientiously regarded. And this must also be the true interest of all other commercial states. Far remote from the dominions of European powers, its growth and prosperity as an independent state may yet be in a high degree useful to all whose trade is extended to those regions, while its nearer approach to this continent and the intercourse which American vessels have with it, such vessels constituting five-sixths of all which annually visit it, could not but create dissatisfaction on the part of the United States at any attempt by another power, should such an attempt be threatened or feared, to take possession of the islands, colonize them, and subvert the native Government. Considering, therefore, that the United States possess so very large a share in the intercourse with those islands, it is deemed not unfit to make the declaration that their Government seeks, nevertheless, no peculiar advantages, no exclusive control over the Hawaiian Government, but is content with its independent existence, and anxiously wishes for its security and prosperity. Its forbearance in this respect, under the circumstances of the very large intercourse which American vessels have with the islands, would justify this Government, should events hereafter arise to require it, in making a decided remonstrance against the adoption of an opposite policy by any other power. Under the circumstances, I recommend to Congress to provide for a moderate allowance, to be made out of the Treasury, to the consul residing there, that, in a Government so new and a country so remote, American citizens may have respectable authority to which to apply for redress in case of injury to their persons and property, and to whom the Government of the country may also make known any acts committed by American citizens of which it may think it has a right to complain.”

Message of President Tyler, Dec. 30, 1842, 6 Webster's Works, 463-'4; II. Ex. Doc. 35, 27th Cong. 3 sess.; For. Rel. 1894, App. II. 39.

The foregoing message of President Tyler and the letter of Mr. Webster grew out of the visit to Washington of William Richards, a clergyman, and Timoteo Haalilio, a native, who visited the United States, England, and France with a view to secure recognition of Hawaiian independence. While saying that the United States regarded the existing authorities in the Islands “as a government suited to the condition of the people” and that that government “ought to be

respected," Mr. Webster also stated that the President did not see any present necessity for the negotiation of a formal treaty, or the appointment or reception of diplomatic characters. A consul or agent would, he said, continue to reside in the islands; and he intimated that the correspondence would be communicated to Congress and would also be "officially made known to the governments of the principal commercial powers of Europe."

Lord George Paulet, of the British man-of-war *Carysfort*, in 1843, seized the islands in the name of Her Britannic Majesty, and compelled the King to sign a deed of cession. Lord Paulet immediately appointed a commis-

**Action of Great Britain, 1843.**

sion to conduct the government. Commodore Kearney, U. S. N., who arrived July 11 in the same year, on the frigate *Constellation*, protested against the cession and also against the acts of the commission so far as they injuriously affected the rights of American citizens. On July 31, 1843, Rear-Admiral Thomas, R. N., who had arrived at Honolulu on the man-of-war *Dublin*, restored the Hawaiian flag and disavowed the act of seizure. June 25, 1843, the British minister at Washington informed the Department of State that the seizure was "entirely unauthorized by Her Majesty's Government." On the 13th of the same month, Mr. Legaré had written, as Secretary of State, to Mr. Everett, then United States minister in London, that "we might even feel justified, consistently with our own principles, in interfering by force to prevent its [the Hawaiian Kingdom] falling into the hands of one of the great powers of Europe."<sup>a</sup>

November 28, 1843, Lord Aberdeen, then foreign secretary, and the French ambassador at London, signed a declaration to the effect that Great Britain and France,

**British-French declaration.**

"taking into consideration the existence in the Sandwich Islands of a government capable of providing for the regularity of its relations with foreign nations, have thought it right to engage, reciprocally, to consider the Sandwich Islands as an independent state, and never to take possession, either directly or under the title of protectorate, or under any other form, of any part of the territory of which they are composed."<sup>b</sup>

"The President has learned with regret and astonishment the probable refusal of the Hawaiian Government to conclude a treaty with the United States upon the terms of the treaty with Great Britain. He entertains the hope that this may not be their final determination. If it should be, he will be compelled to consider it as evidence of a want of friendly feeling toward this Government . . . This Govern-

<sup>a</sup> For. Rel. 1894, App. II. 113. See also Mr. Upshur, Sec. of State, to Mr. Fox, Brit. min., July 5, 1843, MS. Notes to Brit. Leg. VI. 289; Mr. Marcy, Sec. of State, to Mr. Buchanan, March 11, 1854, MS. Inst. Great Britain, XVI. 274.

<sup>b</sup> For. Rel. 1894, App. II. 64.



ment having . . . pledged itself to accord to that of the Hawaiian Islands the rights and privileges of a sovereign state, cannot in honor and justice demand from it anything which, under like circumstances, it would not demand from the most powerful nations. I can discover nothing that would justify this Government in objecting to the decisions of the Hawaiian courts in ordinary cases arising under the municipal laws of the country or in dictating the policy which that Government should pursue upon any domestic subject, and especially that of the tenure of real estate by resident foreigners . . . We ardently desire that the Hawaiian Islands may maintain their independence. It would be highly injurious to our interests, if tempted by their weakness, they should be seized by Great Britain or France; more especially so since our recent acquisitions from Mexico on the Pacific Ocean."

Mr. Buchanan, Sec. of State, to Mr. Ten Eyck, comr. to Hawaii, Aug. 28, 1848, MS. Inst. Hawaii, II. 1.

Mr. Calhoun once intimated that the United States could claim for their citizens in Hawaii the privilege of being tried by a jury of foreigners. (Mr. Calhoun, Sec. of State, to Mr. Mason, Sec. of Navy, Jan. 11, 1845, 35 MS. Dom. Let. 70.)

The treaty concluded by Mr. Clayton in 1849 (*infra*) merely provided, in accordance with the view expressed by Mr. Buchanan, that each country should accord to the citizens of the other the same rights as were secured to its own, or to the citizens of the most favored nation.

In 1849 the armed forces of France took possession of the fort, the Government offices, and other public property at Honolulu, in consequence of disputes with the native authorities, but did not haul down the Hawaiian flag.

**French intervention: American position and treaty.**

Dec. 20, 1849, Mr. John M. Clayton, then Secretary of State, concluded with Mr. James Jackson Jarves, special commissioner of the Hawaiian King, a treaty of friendship, commerce, navigation, and extradition—the first regular treaty between the United States and Hawaii. It was duly ratified.

"The Department will be slow to believe that the French have any intention to adopt with reference to the Sandwich Islands the same policy which they have pursued in regard to Tahiti. If, however, in your judgment, it should be warranted by circumstances, you may take a proper opportunity to intimate to the minister for foreign affairs of France, that the situation of the Sandwich Islands in respect to our possessions on the Pacific, and the bonds, commercial and of other descriptions, between them and the United States are such that we could never with indifference allow them to pass under the dominion or exclusive control of any other power. We do not ourselves covet sovereignty over them. We would be content that they should remain under their

present rulers, who, we believe, are disposed to be just and impartial in their dealings with all nations."

Mr. Clayton, Sec. of State, to Mr. Rives, min. to France, July 5, 1850, For. Rel. 1894, App. II. 87. See, also, Mr. Clayton, Sec. of State, to Messrs. Judd & Jarves, Hawaiian comrs., June 3, 1850, MS. Notes to Hawaii, I. 2.

The proceedings of M. Dillon and the French admiral in Hawaii, in 1849, appearing "to have been incompatible with any just regard for the Hawaiian Government as an independent state," and to indicate "a determination on the part of those officers to humble and annihilate that Government," the "further enforcement" of their demands, which seemed to be the object of M. Perrin's mission, "would be tantamount to a subjugation of the islands to the dominion of France. A step like this could not fail to be viewed by the Government and people of the United States with a dissatisfaction which would tend seriously to disturb our existing friendly relations with the French Government. This is a result to be deplored. If, therefore, it should not be too late, it is hoped that you will make such representations upon the subject to the minister of foreign affairs of France as will induce that Government to desist from measures incompatible with the sovereignty and independence of the Hawaiian Islands, and to make amends for the acts which the French agents have already committed there in contravention of the law of nations, and of the treaty between the Hawaiian Government and France."

Mr. Webster, Sec. of State, to Mr. Rives, min. to France, June 19, 1851, For. Rel. 1894, App. II. 97.

"The Government of the United States was the first to acknowledge the national existence of the Hawaiian Government, and to treat with it as an independent state. Its example was soon followed by several of the Governments of Europe, and the United States, true to its treaty obligations, has in no case interfered with the Hawaiian Government for the purpose of opposing the course of its own independent conduct, or of dictating to it any particular line of policy. . . . It declared its real purpose to be to favor the establishment of a Government at a very important point in the Pacific Ocean, which should be able to maintain such relations with the rest of the world as are maintained between civilized states. . . .

"This Government still desires to see the nationality of the Hawaiian Government maintained, its independent administration of public affairs respected, and its prosperity and reputation increased.

"But while thus indisposed to exercise any sinister influence itself over the councils of Hawaii, or to overawe the proceedings of its Government by the menace or the actual application of superior military force, it expects to see other powerful nations act in the same spirit.

It is, therefore, with unfeigned regret that the President has read the correspondence and become acquainted with the circumstances occurring between the Hawaiian Government and Mr. Perrin, the commissioner of France, at Honolulu. . . . The Hawaiian Islands are ten times nearer to the United States than to any of the powers of Europe. Five-sixths of all their commercial intercourse is with the United States, and these considerations, together with others of a more general character, have fixed the course which the Government of the United States will pursue in regard to them. The annunciation of this policy will not surprise the Governments of Europe, nor be thought to be unreasonable by the nations of the civilized world; and that policy is, that while the Government of the United States itself, faithful to its original assurance, scrupulously regards the independence of the Hawaiian Islands, it can never consent to see those islands taken possession of by either of the great commercial powers of Europe, nor can it consent that demands manifestly unjust and derogatory, and inconsistent with a *bona fide* independence, shall be enforced against that Government."

Mr. Webster, Sec. of State, to Mr. Severance, U. S. minister at Honolulu, No. 4, July 14, 1851, For. Rel. 1894, App. II. 99-101. Mr. Webster added that the substance of this instruction had been intimated to the Government of France, and that M. Sartiges, the French minister at Washington, had declared that his Government had no intention of taking the islands or of acting toward them in an aggressive spirit. In an unnumbered and private instruction to Mr. Severance, of July 14, 1851, Mr. Webster said: "In my official letter of this date I have spoken of what the United States would do in certain contingencies. But in thus speaking of the Government of the United States I do not mean the executive power, but the Government in its general aggregate, and especially that branch of the Government which possesses the war-making power. This distinction you will carefully observe, and you will neither direct, request, nor encourage any naval officer of the United States in committing hostilities on French vessels of war." Mr. Severance was also to refrain from encouraging in anyone "any idea or expectation that the islands will become annexed to the United States," and he was directed to return a deed of cession which the king had placed in his hands. (For. Rel. 1894, App. II. 101-102.)

"It is earnestly to be hoped that the differences which have for some time past been pending between the Government of the French Republic and that of the Sandwich Islands, may be peaceably and durably adjusted so as to secure the independence of those islands. Long before the events which have of late imparted so much importance to the possessions of the United States on the Pacific we acknowledged the independence of the Hawaiian Government. This Government was first in taking that step, and several of the leading powers of Europe immediately followed. We were influenced in this measure by the existing and prospective importance of the islands as a place of refuge

and refreshment for our vessels engaged in the whale fishery, and by the consideration that they lie in the course of the great trade which must, at no distant day, be carried on between the western coast of North America and Eastern Asia.

"We were also influenced by a desire that those islands should not pass under the control of any other great maritime state, but should remain in an independent condition, and so be accessible and useful to the commerce of all nations. I need not say that the importance of these considerations has been greatly enhanced by the sudden and vast development which the interests of the United States have obtained in California and Oregon, and the policy heretofore adopted in regard to those islands will be steadily pursued."

President Fillmore, Second Annual Message, Dec. 2, 1851, Richardson's Messages, V. 120.

September 22, 1853, Mr. Marcy, who had then become Secretary of State, observed that the islands would, at some period perhaps not far distant, come under the protectorate of or be transferred to some foreign power. It was not, said Mr. Marcy, the policy of the United States to accelerate such a change, but if in the course of events it became unavoidable, the United States would rather acquire their sovereignty than see it transferred to any other power. "The intercourse between our Pacific ports and the ports of the distant East is," continued Mr. Marcy, "destined perhaps to be upon as large a scale as that which we now enjoy with all the world, and the vessels engaged in that trade must ever resort to the Sandwich Islands for fuel and other supplies, as has ever been the case with our whale ships in their outward and inward voyages. It is consequently indispensable to our welfare that the policy which governs them should be liberal, and that it should continue free from the control of any third country."<sup>a</sup>

Dispatches subsequently received from Mr. Gregg indicated that the Hawaiian Government had become convinced of its inability to sustain itself any longer as an independent state, and that it was prepared to throw itself upon the protection of the United States, or to seek incorporation into the American political system. To Mr. Marcy it seemed "inevitable that they [the Hawaiian Islands] must come under the control of this Government," and to be "but reasonable and fair" that England and France "should acquiesce in such a disposition of them, provided the transference was effected by fair means." Both England and France were already "apprised of our determination not to allow them to be owned by or to fall under the protection of either of these powers or of any other European nation."<sup>b</sup>

<sup>a</sup> Mr. Marcy, Sec. of State, to Mr. Gregg, min. to Hawaii, Sept. 22, 1853, MS. Inst. to Hawaii, II. 43.

<sup>b</sup> Mr. Marcy, Sec. of State, to Mr. Mason, minister to France, December 16, 1853. For. Rel. 1894, App. II. 106.

Mr. Marcy subsequently instructed Mr. Gregg to negotiate a treaty of annexation.<sup>a</sup> Mr. Gregg negotiated such a treaty, but it was unsatisfactory to the United States, not only because of the excessive amount of annuities which it pledged to the native rulers, but also because it provided that the islands should be "incorporated into the American Union as a State."<sup>b</sup> Before the necessary changes in the treaty could be obtained the reigning king died, and as his successor was unfavorable to annexation the negotiations failed.

July 20, 1855, Mr. Marcy signed, with a commissioner of the Hawaiian Government, at Washington, a treaty of reciprocity. This treaty was not ratified, although the Senate Committee on Foreign Relations is said to have been favorable to it.<sup>c</sup> During the Civil War in the United States, the Hawaiian Government sought to revive the reciprocity treaty, but, in view of the probable effect of such a measure on the public revenue at that time, it was not thought advisable at Washington to entertain the subject.<sup>d</sup> The rank of the diplomatic officer of the United States at Honolulu was raised in 1863 to that of minister resident. In December, 1866, Emma, Queen Dowager of Hawaii, visited the United States on her way from England to Honolulu.<sup>e</sup> On May 21, 1867, a new reciprocity treaty was concluded, but after remaining in suspense three years it was rejected by the United States Senate June 1, 1870.<sup>f</sup>

Meanwhile the question of annexation was again agitated and the minister of the United States at Honolulu was instructed "that a lawful and peaceful annexation of the islands to the United States, with the consent of the people of the Sandwich Islands, is deemed desirable by this Government; and that if the policy of annexation should really conflict with the policy of reciprocity, annexation is in every case to be preferred."<sup>g</sup>

<sup>a</sup> Mr. Marcy, Sec. of State, to Mr. Gregg, April 4, 1854, For. Rel. 1894, App. II. 121.

<sup>b</sup> For. Rel. 1894, App. II. 121-131.

<sup>c</sup> Mr. Marcy, after the signature of the treaty, said: "In view of the geographical position of those [Hawaiian] islands, and the magnitude of the American interests therein, the United States would not regard with unconcern an attempt on the part of any foreign power, and especially any European maritime power, to disturb the repose or interfere with the security of the Hawaiian Government." (Mr. Marcy, Sec. of State, to Mr. Lee, Hawaiian comr., Sept. 21, 1855, MS. Notes to Hawaii, I. 4.)

<sup>d</sup> For. Rel. 1894, App. II. 136, Report of Mr. Seward, Secretary of State, to the President. See, also, Mr. Seward, Sec. of State, to Mr. Allen, Jan. 11, 1864, MS. Notes to Hawaii, I. 32; to Mr. McBride, Feb. 8, 1864, and Oct. 17, 1864, MS. Inst. Hawaii, II. 113, 120.

<sup>e</sup> Mr. Seward, Sec. of State, to Mr. McCook, Sept. 24, 1866, MS. Inst. Hawaii, II. 146.

<sup>f</sup> Mr. Seward, Sec. of State, to Mr. McCulloch, Sec. of Treasury, Jan. 30, 1867, 75 MS. Dom. Let. 168.

<sup>g</sup> Mr. Seward, Sec. of State, to Mr. McCook, September 12, 1867, For. Rel. 1894, App. II. 143.

A year later, however, Mr. Seward wrote that "the public attention sensibly continues to be fastened upon the domestic questions which have grown out of the late Civil War. The public mind refuses to dismiss these questions even so far as to entertain the higher but more remote questions of national extension and aggrandizement."<sup>a</sup>

Early in 1871, the discussion of annexation was reopened by the minister of the United States at Honolulu.<sup>b</sup> His dispatch was confidentially communicated to the Senate by President Grant without any recommendation, but with the statement that the views of the Senate, if it should be deemed proper to express them, "would be very acceptable with reference to any future course which there might be a disposition to adopt."<sup>c</sup>

"The position of the Sandwich Islands as an outpost fronting and commanding the whole of our possessions on the Pacific Ocean, gives to the future of those islands a peculiar interest to the Government and people of the United States. It is very clear that this Government can not be expected to assent to their transfer from their present control to that of any powerful maritime or commercial nation. Such transfer to a maritime power would threaten a military surveillance in the Pacific similar to that which Bermuda has afforded in the Atlantic—the latter has been submitted to from necessity, inasmuch as it was congenital with our Government—but we desire no additional similar outposts in the hands of those who may at some future time use them to our disadvantage.

"The condition of the Government of Hawaii and its evident tendency to decay and dissolution force upon us the earnest consideration of its future—possibly its near future.

"There seems to be a strong desire on the part of many persons in the islands, representing large interests and great wealth, to become annexed to the United States. And while there are, as I have already said, many and influential persons in this country who question the policy of any insular acquisitions, perhaps even of any extension of territorial limits, there are also those of influence and of wise foresight who see a future that must extend the jurisdiction and the limits of this nation, and that will require a resting spot in the midocean,

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<sup>a</sup>Mr. Seward, Sec. of State, to Mr. Spalding, July 5, 1868, For. Rel. 1894, App. II. 144. See, also, confidential circular, Mr. Seward, Sec. of State, to Mr. Dix, min. to France, Aug. 31, 1868, referring to a special mission from Hawaii to Europe for the revision of treaties, and saying: "While the opinion extensively prevails among us that the sovereignty of those islands ought to be acquired without delay by the United States, the opinion is universal that it would be incompatible with the interests of the United States to let the islands fall under the jurisdiction, protection, or dominating influence of any foreign power." (MS. Inst. France, XVIII. 191.)

<sup>b</sup>Mr. Pierce to Mr. Fish, February 25, 1871, For. Rel. 1894, App. II. 17.

<sup>c</sup>Confidential message to the Senate, April 5, 1871, For. Rel. 1894, App. II. 16; Mr. Fish, Sec. of State, to Mr. Pierce, April 5, 1871, MS. Inst. Hawaii, II. 212.

between the Pacific coast and the vast domains of Asia, which are now opening to commerce and Christian civilization."

Mr. Fish, Sec. of State, to Mr. Pierce, min. to Hawaii, March 25, 1873, For. Rel. 1894, App. II. 19; MS. Inst. Hawaii, II. 243. See Mr. J. C. B. Davis, Act. Sec. of State, to Mr. Pierce, March 15, 1873, MS. Inst. Hawaii, II. 242; Mr. Fish, Sec. of State, to Mr. Pierce, June 27 and Oct. 15, 1873, MS. Inst. Hawaii, II. 252, 256.

In 1874 King Kalakaua, with a suite of several persons and accompanied by the American minister, visited the United States. He arrived in San Francisco at the end of November, and after visiting Washington made a journey through New England and other parts of the country. He returned to Hawaii in February, 1875, on the U. S. S. *Pensacola*. One of the principal objects of his visit was to obtain a reciprocity treaty.<sup>a</sup>

January 30, 1875, there was concluded between the United States and the Hawaiian Islands a convention concerning commercial reciprocity. Article IV., as amended by the Senate, provided that His Hawaiian Majesty should not, while the treaty remained in force, "lease or otherwise dispose of or create any lien upon any port, harbor, or other territory in his dominions, or grant any special privilege or rights of use therein to any other power, state, or government, nor make any treaty by which any other nation shall obtain the same privileges, relative to the admission of any articles free of duty, hereby secured to the United States." Another amendment of the Senate, in Art. V., provided that the treaty should not take effect till a law to carry it into operation should be passed by the Congress of the United States.

Such a law was approved Aug. 15, 1876, and on the 9th of September the President by proclamation declared the treaty to be in operation.<sup>b</sup> Claims were afterwards made by British and German merchants, with the support of their Governments, for the benefits of the treaty in Hawaii under the most-favored-nation clauses in their treaties with that Government. By a separate article to the treaty between Germany and Hawaii, concluded at Berlin March 25 and at Honolulu Sept. 19, 1879, it was expressly agreed that "the special advantages granted by said convention [of Jan. 30, 1875] to the United States of America, in consideration of equivalent advantages, shall not in any

<sup>a</sup> For. Rel. 1875, I. 669-679; S. Ex. Doc. 2, 44 Cong. 1 sess. See Mr. Fish, Sec. of State, to Mr. Pierce, April 8, 1875, MS. Inst. Hawaii, II. 286.

<sup>b</sup> The treaty is discussed in the President's Message of Dec. 6, 1875, H. Ex. Doc. 1, 44 Cong. 1 sess.; reports, favorable and unfavorable, on the bill to carry it into effect may be found in H. Report 116, parts 1 and 2, 44 Cong. 1 sess. and the debates may be seen in the Cong. Record. See also the President's Message, Dec. 9, 1876, H. Ex. Doc. 1, 44 Cong. 2 sess.; and the President's proclamation of Sept. 9, 1876, 19 Stats. 666.

case be invoked in favor of the relations sanctioned . . . by the present treaty," though it contained (Art. III) a most-favored-nation clause. In respect of the claims of the British merchants, the Government of the United States informed that of Hawaii that it would consider their admission as a violation of the treaty, and that "if any other power should deem it proper to employ undue influence upon the Hawaiian Government to persuade or compel action in derogation of this treaty, the Government of the United States will not be unobservant of its rights and interests, and will be neither unwilling nor unprepared to support the Hawaiian Government in the faithful discharge of its treaty obligations."<sup>a</sup>

"The position of the Hawaiian Islands in the vicinity of our Pacific coast, and their intimate commercial and political relations with us, lead this Government to watch with grave interest, and to regard unfavorably, any movement, negotiation, or discussion aiming to transfer them in any eventuality whatever to another power."

Assertions of American predominance.

Mr. Blaine, Sec. of State, to Mr. Lowell, Apr. 23, 1881, MS. Inst. Gr. Brit., XXVI. 112; Mr. Blaine, Sec. of State, to Mr. White, min. to Germany, April 22, 1881, XVII. 70.

"The Government of the United States has always avowed and now repeats that, under no circumstances, will it permit the transfer of the territory or sovereignty of these islands to any of the great European powers. It is needless to restate the reasons upon which that determination rests. It is too obvious for argument that the possession of these islands by a great maritime power would not only be a dangerous diminution of the just and necessary influence of the United States in the waters of the Pacific, but in case of international difficulty it would be a positive threat to interests too large and important to be lightly risked.

"Neither can the Government of the United States allow an arrangement which, by diplomatic *finesse* or legal technicality, substitutes for the native and legitimate constitutional Government of Hawaii the controlling influence of a great foreign power. This is not the real and substantial independence which it desires to see and which it is prepared to support. And this Government would consider a scheme by which a large mass of British subjects, forming in time not improbably the majority of its population, should be introduced into Hawaii, made independent of the native Government, and be ruled by British authorities, judicial and diplomatic, as one entirely inconsistent with the friendly relations now existing between us, as trenching upon

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<sup>a</sup> Mr. Blaine, Sec. of State, to Mr. Conly, minister to Hawaii, June 30, 1881, For. Rel. 1881, 624-626.



treaty rights which we have secured by no small consideration, and as certain to involve the two countries in irritating and unprofitable discussion."

Mr. Blaine, Sec. of State, to Mr. Comly, U. S. minister at Honolulu, Nov. 19, 1881, For. Rel. 1881, 633.

"Before the United States had become a power on the Pacific coast, the commercial activity of our people was manifested in their intercourse with the islands of Oceanica, of which the Hawaiian group is the northern extremity. In 1848 the treaty of Guadalupe Hidalgo confirmed the territorial extension of the United States to the Pacific, and gave to the Union a coast line on that ocean little inferior in extent, and superior in natural wealth, to the Atlantic seaboard of the original thirteen States. In 1848-49 the discoveries of gold in California laid the foundation for the marvelous development of the western coast, and in that same year the necessities of our altered relationship to the Pacific Ocean found expression in a comprehensive convention of friendship, commerce, and navigation with the sovereign Kingdom of Hawaii. . . . The movements toward intimate commercial relations between the two countries after the progressive negotiations of 1856, 1867, and 1869, culminated in the existing reciprocity treaty of January 30, 1875, which gave to the United States in Hawaii, and to Hawaii in the United States, trading rights and privileges in terms denied to other countries. . . .

"Since that time [1848] our domain on the Pacific has been vastly increased by the purchase of Alaska. Taking San Francisco as the commercial center on the western slope, a line drawn northwestwardly to the Aleutian group marks our Pacific border almost to the confines of Asia. A corresponding line drawn southwestwardly from San Francisco to Honolulu marks the natural limit of the ocean belt within which our trade with the oriental countries must flow, and is, moreover, the direct line of communication between the United States and Australasia. Within this belt lies the commercial domain of our western coast.

"I have had recent occasion to set forth the vitally integral importance of our Pacific possessions, in a circular letter addressed on the 24th of June last to our representatives in Europe, touching the necessary guarantees of the proposed Panama Canal as a purely American waterway to be treated as part of our own coast line. The extension of commercial empire westward from those States is no less vitally important to their development than is their communication with the eastern coast by the isthmian channel. . . .

"In thirty years the United States has acquired a legitimately dominant influence in the North Pacific, which it can never consent to see decreased by the intrusion therein of any element of influence hostile

to its own. The situation of the Hawaiian Islands, giving them the strategic control of the North Pacific, brings their possession within the range of questions of purely American policy, as much so as that of the Isthmus itself. Hence the necessity, as recognized in our existing treaty relations, of drawing the ties of intimate relationship between us and the Hawaiian Islands so as to make them practically a part of the American system without derogation of their absolute independence. The reciprocity treaty of 1875 has made of Hawaii the sugar-raising field of the Pacific slope, and gives to our manufacturers therein the same freedom as in California and Oregon. That treaty gave to Hawaii its first great impetus in trade, and developed that activity of production which has attracted the eager attention of European powers anxious to share in the prosperity and advantages which the United States have created in mid-ocean. From 1877, the first full year succeeding the conclusion of the reciprocity treaty, to 1880, the imports from Hawaii to the United States nearly doubled, increasing from \$2,550,335 in value to \$4,606,444, and in this same period the exports from the United States to Hawaii rose from \$1,272,949 to \$2,026,170. In a word, Hawaii is, by the wise and beneficent provisions of the treaty, brought within the circle of the domestic trade of the United States, and our interest in its friendly neutrality is akin to that we feel in the guaranteed independence of Panama. On the other hand, the interests of Hawaii must inevitably turn toward the United States in the future, as in the present, as its natural and sole ally in conserving the dominion of both in the Pacific trade. Your own observation, during your residence at Honolulu, has shown you the vitality of the American sentiment which this state of things has irresistibly developed in the islands. I view that sentiment as the logical recognition of the needs of Hawaii as a member of the American system of states rather than as a blind desire for a protectorate or ultimate annexation to the American Union.

“This Government has on previous occasions been brought face to face with the question of a protectorate over the Hawaiian group. It has, as often as it arose, been set aside in the interest of such commercial union and such reciprocity of benefits as would give to Hawaii the highest advantages, and at the same time strengthen its independent existence as a sovereign state. In this I have summed up the whole disposition of the United States toward Hawaii in its present condition.

“The policy of this country with regard to the Pacific is the natural complement to its Atlantic policy. The history of our European relations for fifty years shows the jealous concern with which the United States has guarded its control of the coast from foreign interference, and this without extension of territorial possession beyond the mainland. It has always been its aim to preserve the friendly neutrality of the adjacent states and insular possessions. Its attitude toward Cuba is in point. . . .

"Hawaii, although much farther from the Californian coast than is Cuba from the Floridian peninsula, holds in the western sea much the same position as Cuba in the Atlantic. It is the key to the maritime dominion of the Pacific States, as Cuba is the key to the Gulf trade. The material possession of Hawaii is not desired by the United States any more than was that of Cuba. But under no circumstances can the United States permit any change in the territorial control of either which would cut it adrift from the American system, whereto they both indispensably belong.

"In this aspect of the question it is readily seen with what concern this Government must view any tendency toward introducing into Hawaii new social elements destructive of its necessarily American character. The steady diminution of the native population of the islands, amounting to some 10 per cent. between 1872 and 1878, and still continuing, is doubtless a cause of great alarm to the Government of the Kingdom, and it is no wonder that a solution should be sought with eagerness in any seemingly practicable quarter. The problem, however, is not to be met by a substitution of Mongolian supremacy for native control, as seems at first sight possible through the rapid increase in Chinese immigration to the islands. Neither is a wholesale introduction of the coolie element, professedly Anglo-Indian, likely to afford any more satisfactory outcome to the difficulty. The Hawaiian Islands can not be joined to the Asiatic system. If they drift from their independent station it must be toward assimilation and identification with the American system, to which they belong by the operation of natural laws and must belong by the operation of political necessity. . . . It [the United States] firmly believes that the position of the Hawaiian Islands as the key to the dominion of the American Pacific demands their neutrality, to which end it will earnestly co-operate with the native Government. And if, through any cause, the maintenance of such a position of neutrality should be found by Hawaii to be impracticable, this Government would then unhesitatingly meet the altered situation by seeking an avowedly American solution for the grave issues presented."

Mr. Blaine, Sec. of State, to Mr. Comly, min. to Hawaii, Dec. 1, 1881, For. Rel. 1881, 635 et seq.

In a confidential instruction to Mr. Comly of the same date (For. Rel. 1894, App. II. 1161; MS. Inst. Hawaii, II. 429), Mr. Blaine said: "There is little doubt that were the Hawaiian Islands, by annexation or distinct protection, a part of the territory of the Union, their fertile resources for the growth of rice and sugar would not only be controlled by American capital, but so profitable a field of labor would attract intelligent workers thither from the United States.

"A purely American form of colonization in such a case would meet all the phases of the problem. Within our borders could be found the capital, the intelligence, the activity, and the necessary labor trained in the rice swamps and cane fields of the Southern States. And it may be well to consider how, even in the chosen alternative of maintaining Hawaiian

independence, these prosperous elements could be induced to go from our shores to the islands, not like the coolies, practically enslaved, not as human machines, but as thinking, intelligent, working factors in the advancement of the material interests of the islands."

"Your No. 217, of the 8th instant, in which you report the political tendencies now making themselves manifest in the islands, and the movement in the direction of onerous taxation of capital and property to a degree which can not fail to work injury to the foreign interests and enterprise which have built up Hawaiian prosperity, has been read with attention. . . .

"While this Government recognized from the first the constitutional sovereignty of Hawaii, and still recognizes her right to adjust internal matters of taxation and revenue on constitutional principles, yet it can not permit to pass without very urgent protest in all proper quarters a measure subversive of the material interests of so many of its citizens who, on the faith of international comity, have given their wealth, labor, and skill to aid in the prosperity of Hawaii. And it makes this protest the more earnestly, inasmuch as the treaty relations between the two countries (in which Hawaiian interests were even more subserved than our own) are such as to give the United States the moral right to expect that American property in Hawaii will be no more burdened than would Hawaiian property in the United States."

Mr. Frelinghuysen, Sec. of State, to Mr. Comly, May 31, 1882, For. Rel. 1882, 343.

"The right of the Hawaiian Government to admit to or to exclude from its dominions immigrants of any nationality or race is not for a moment questioned by this, but that the exclusive privilege of carrying immigrants who are admitted to Hawaii should be accorded to any one company owning a particular line of ships, whether American, Hawaiian, or foreign to both countries, is believed to be in itself unjust, and, as I have already observed, wholly inconsistent with the due maintenance of the treaty of 1849. The Pacific Mail Steamship Company have no right to demand an exclusive privilege in such carrying trade, but it may, with manifest propriety, under the terms of the treaty, insist that no discriminating measures against its vessels shall be maintained or permitted by the Hawaiian Government."

Mr. Frelinghuysen, Sec. of State, to Mr. Daggett, min. to Hawaii, Nov. 15, 1883, For. Rel. 1883, 567, 568.

"I have had the honor of receiving your note of the 18th of October last, inclosing a signed protest on the part of the Hawaiian Government against the annexation of archipelagoes and islands of Polynesia by foreign powers, and especially by Great Britain, in behalf of which protest the sympathies of this Government are asked.

"It is unnecessary to assure you that the sympathies of this Government and the people of this country are always in favor of good self-government by the independent communities of the world.

"While we could not, therefore, view with complacency any movement tending to the extinction of the national life of the intimately connected commonwealths of the Northern Pacific, the attitude of this Government toward the distant outlying groups of Polynesia is necessarily different.

"It is understood that the agitation to which the protest refers as now existing in Australia contemplates the immediate protection and eventual annexation of the New Hebrides, the Solomon Islands, and the immediately adjacent groups of the Australian colonial system. These islands are geographically allied to Australasia rather than to Polynesia. At no time have they so asserted and maintained a separate national life as to entitle them to entrance, by treaty stipulations and established forms of competent self-government, into the family of nations, as Hawaii and Samoa have done. Their material development has been largely due to their intercourse with the great Australian system, near which they lie, and this Government would not feel called upon to view with concern any further strengthening of such intercourse when neither the sympathies of our people are touched nor their direct political or commercial relations with those scattered communities threatened by the proposed change.

"The President, before whom the protest has been brought, moved by these considerations, does not regard the matter as one calling for the interposition of the United States, either to oppose or support the suggested measure."

Mr. Frelinghuysen, Sec. of State, to Mr. Carter, Hawaiian min., Dec. 6, 1883,  
For. Rel. 1883, 575.

"I express my unhesitating conviction that the intimacy of our relations with Hawaii should be emphasized. As a result of the reciprocity treaty of 1875, those islands, on the highway of Oriental and Australasian traffic, are virtually an outpost of American commerce and a stepping-stone to the growing trade of the Pacific. The Polynesian Island groups have been so absorbed by other and more powerful governments, that the Hawaiian Islands are left almost alone in the enjoyment of their autonomy, which it is important for us should be preserved. Our treaty is now terminable on one year's notice, but propositions to abrogate it would be, in my judgment, most ill-advised. The paramount influence we have there acquired, once relinquished, could only with difficulty be regained, and a valuable ground of vantage for ourselves might be converted into a stronghold for our commercial competitors. I earnestly recommend that the existing treaty stipulations be extended for a further term

of seven years. A recently signed treaty to this end is now before the Senate.

“The importance of telegraphic communication between those islands and the United States should not be overlooked.”

President Cleveland, annual message, Dec. 6, 1886.

December 27, 1886, the legation of the United States at Honolulu reported that King Kalakaua had commissioned one of his subjects as “minister plenipotentiary to the Kings of Samoa and Tonga, and the independent chiefs and peoples of Polynesia,” and that the envoy had departed for Samoa with a secretary of legation and two attachés. This mission resulted in the conclusion, in February and March, 1887, of a treaty of “political confederation” between Hawaii and Samoa. Not long afterwards, however, the legation reported that the special mission had been recalled and that what was commonly known as “the Hawaiian Polynesian policy” had come to an end.<sup>a</sup>

“The tenor of your late dispatches coincides with other reports from the Hawaiian Kingdom, and indicates the most unsatisfactory and disturbed condition of affairs in the government of that country, which renders it essential that the strictest vigilance should be exercised by those charged with the care of the rights of American citizens within that jurisdiction, as well as the rights of the United States secured under existing international conventions.

“Whilst regretting deeply the existence of domestic disorders in Hawaii, and with no disposition whatever to interfere therein or to obtrude counsel unasked, yet the consequences which may possibly result to the interests of American citizens which have grown up under the extension of the commerce between that country and the United States, under the guaranties of existing treaty, must not be jeopardized by internal confusion in the government of these islands, and it is the duty of the United States to see that these interests are not imperiled or injured, and to do all things necessary for their just protection.

“The existing treaty between the United States and Hawaii, as was contemplated and intended by the parties thereto, has created and fostered commercial relations more intimate in their nature and of incomparably greater volume and value than Hawaii ever had or ever can have with any other government.

“The growth of this commerce and the consequent advancement of these islands in wealth and importance has been most satisfactory to

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<sup>a</sup>Mr. Hastings, chargé at Honolulu, to Mr. Bayard, Sec. of State, Dec. 27, 1886; Mr. Merrill, min. to Hawaii, to Mr. Bayard, Sec. of State, March 29 and July 13, 1887, For. Rel. 1887, 566, 569, 581; Mr. Bayard, Sec. of State, to Mr. Carter, Hawaiian min., April 12, 1887, MS. Notes to Hawaii, I. 119; Mr. Bayard, Sec. of State, to Mr. Merrill, min. to Hawaii, Jan. 8, 1887, MS. Inst. Hawaii, III. 28.

the United States, and by reason of their geographical position and comparative propinquity to our own territory they possess an interest and importance to us far exceeding that with which they can be regarded by any other power. In the absence of any detailed information from you of the late disorders in the domestic control of Hawaii, and the changes which have taken place in the official corps of that Government, I am not able to give you other than general instructions, which may be communicated in substance to the commanding officer of the vessel or vessels of this Government in the waters of Hawaii, with whom you will freely confer, in order that such prompt and efficient action may be taken as the circumstances may make necessary.

“Whilst we abstain from interference with the domestic affairs of Hawaii, in accordance with the policy and practice of this Government, yet obstruction to the channels of legitimate commerce under existing treaty must not be allowed, and American citizens in Hawaii must be protected in their persons and property by the representatives of their country’s law and power, and no internal discord must be suffered to impair them. Your own aid and counsel, as well as the assistance of the officers of our Government vessels, if found necessary, will therefore be promptly afforded to promote the reign of law and respect for orderly government in Hawaii.

“As is well known, no intent is cherished or policy entertained by the United States which is otherwise than friendly to the autonomous control and independence of Hawaii, and no other member of the family of nations has so great and immediate an interest in the welfare and prosperity of Hawaii on such a basis as this Republic.

“The vast line of our national territory on the Pacific coast, and its neighborhood to the Hawaiian group, indicate the recognized predominance of our interests in the region of these islands.

“This superiority of interest in the welfare of the Hawaiian Islands is accompanied by an appreciation of the right of these friendly inhabitants and their Government to our good offices, which we freely tender whenever they can be efficacious in securing the safety and promoting the welfare of that island group.”

Mr. Bayard, Sec. of State, to Mr. Merrill, min. to Hawaii, July 12, 1887, For. Rel. 1887, 580. See, also, Mr. Bayard, Sec. of State, to Mr. Phelps, min. to England, May 13, 1887, referring to the visit of Queen Kapiolani, consort of King Kalakaua, to Washington, en route to England to attend the Queen’s Jubilee. Queen Kapiolani was attended by the Princess Liliuokalani, sister of the King, and her husband, General Dominis, who was understood to be charged with negotiations concerning steamship facilities and a loan. (MS. Inst. Great Britain, XXVIII. 320.) An account of Queen Kapiolani’s reception in Washington is given in Mr. Bayard, Sec. of State, to Mr. Merrill, min. to Hawaii, May 26, 1887, MS. Inst. Hawaii, III. 38.

In 1883 the term of seven years for which the reciprocity treaty was to endure expired, and the treaty became terminable on twelve months' notice by either party. The subject of its definite extension was discussed not only diplomatically, but also in Congress.<sup>a</sup> A convention definitely extending it for seven years, after which it was again to become terminable on twelve months' notice, was concluded at Washington, December 6, 1884. Owing to opposition, springing chiefly from sugar interests in the United States, but also to some extent from constitutional objections to reciprocity treaties in general, the ratifications of this convention were not exchanged until November 9, 1887.<sup>b</sup>

By an amendment inserted as Art. II. by the United States Senate, the King of Hawaii granted to the Government of the United States "the exclusive right to enter the harbor of Pearl River in the island of Oahu, and to establish and maintain there a coaling and repair station for the use of vessels of the United States," and to that end to "improve the entrance to said harbor, and do all other things needful to the purpose aforesaid."<sup>c</sup> Before the exchange of ratifications the Hawaiian Government sought an explanation of this provision, to the effect that it did not and was not intended "to invade or diminish in any way the autonomous jurisdiction of Hawaii while giving to the United States the exclusive right of the use of Pearl Harbor stipulated therein, for the sole purpose stated in the article, and, further, that the Article II. of the convention, and the privileges conveyed by it, will cease and determine with the termination of the treaty of 1875, under the conditions fixed by this convention."<sup>d</sup> The Department of State, while disclaiming any power "to qualify, expand, or explain" the amendment of the Senate, declared that "no ambiguity or obscurity" was observable in it, and that there was discerned in it "no subtraction from Hawaiian sovereignty over the harbor to which it relates, nor any language importing a longer duration" than that prescribed for the treaty of 1875 as extended.<sup>e</sup>

On December 23, 1887, Sir Lionel West, British minister at Washington, handed to Mr. Bayard the following memorandum:

<sup>a</sup> See House Report 1860, 47 Cong. 2 sess.; Senate Report 76, 48 Cong. 1 sess., parts 1 and 2.

<sup>b</sup> See report of Mr. Tucker, March 3, 1887, H. Report 4177, 49 Cong. 2 sess., stating constitutional objections. See, as to the failure of the ratifications of the Marcy reciprocity treaty of 1855, Mr. Seward, Sec. of State, to Mr. McCulloch, Sec. of Treas., Jan. 17, 1867, 75 MS. Dom. Let. 105.

<sup>c</sup> For. Rel. 1887, 588.

<sup>d</sup> Mr. Carter, Hawaiian min., to Mr. Bayard, Sec. of State, Sept. 23, 1887, For. Rel. 1887, 589, 591.

<sup>e</sup> Mr. Bayard, Sec. of State, to Mr. Carter, Hawaiian minister, Sept. 23, 1887, For. Rel. 1887, 591. See, also, Mr. Bayard, Sec. of State, to Mr. Merrill, Min. to Hawaii, Sept. 26, 1887, MS. Inst. Hawaii, III. 56.



"England and France by the convention of November 28, 1843, are bound to consider the Sandwich Islands as an independent State and never to take possession, either directly or under the title of a protectorate or any other form, of any part of the territory of which they are composed.

"The best way to secure this object would, in the opinion of Her Majesty's Government, be that the powers chiefly interested in the trade of the Pacific should join in making a formal declaration similar to that of 1843 above alluded to, and that the United States Government should, with England and Germany, guarantee the neutrality and equal accessibility of the islands and their harbors to the ships of all nations without preference."<sup>a</sup>

To this communication Mr. Bayard replied:

"PERSONAL.]

"DEPARTMENT OF STATE,

"Washington, February 15, 1888.

"DEAR SIR LIONEL: After reading the memorandum of Lord Salisbury in relation to the Sandwich Islands, it does not occur to me that I can add anything to what I stated to you orally in our interview on the 23d of December last, when you first sent it to me.

"I was glad to find that you quite understood and had conveyed to your Government the only significance and meaning of the Pearl Harbor concession by the Hawaiian Government, as provided in the late treaty of that Government with the United States, and that it contained nothing to impair the political sovereignty of Hawaii.

"The existing treaties of the United States and Hawaii create, as you are aware, special and important reciprocities, to which the present material prosperity of Hawaii may be said to owe its existence, and by one of the articles the cession of any part of the Hawaiian territory to any other government without the consent of the United States is inhibited.

"In view of such existing arrangements it does not seem needful for the United States to join with other governments in their guaranties to secure the neutrality of Hawaiian territory, nor to provide for that equal accessibility of all nations to those ports which now exists."

July 30, 1889, an insurrection under the lead of two Hawaiian half-castes, named Robert W. Wilcox and Robert Boyd, took place at Honolulu. It was soon suppressed, and during the disturbance a force of marines from the U. S. S. *Adams* was landed by permission, with a machine gun, to protect life and property at the legation and in the city, their appearance on the streets having a favorable effect on the population. Soon after the attempted revolution, the supreme court of Hawaii rendered a decision to the effect that the king could govern only through

Constitution of 1887;

insurrection of 1889.

<sup>a</sup> For. Rel. 1894, App. II. 24.

his cabinet. This decision was rendered under the constitution which, as the result of "an uprising of nearly the whole foreign population, supported by the better class of natives," King Kalakaua had accepted and signed on June 30, 1887; a constitution designed to substitute, for the personal rule of the king, government by a cabinet responsible only to the legislature.<sup>a</sup> While government was more securely conducted under this system, yet a certain native antagonism was exhibited toward it, not only because it curtailed the powers of the native king but also because it increased the political privileges of the foreign residents, who were allowed to enjoy political rights without renouncing their foreign allegiance and citizenship.<sup>b</sup>

In January, 1891, King Kalakaua, who had lately arrived in the United States on a friendly visit, died at San Francisco. The Princess Liliuokalani, who had accompanied Queen Kapiolani at the celebration of the Victorian jubilee in London in 1887, and who, when Kalakaua departed for San Francisco, was appointed regent during his absence, was proclaimed Queen.<sup>c</sup> She was duly recognized by the United States.<sup>d</sup>

In January, 1893, a revolution took place at Honolulu. The abdication of the Queen was secured and a provisional government, at the head of which was Judge Sanford B. Dole, was set up, to continue till annexation to the United States should be accomplished. February 14, 1893, a treaty of annexation was signed at Washington by Mr. Foster, Secretary of State, and five commissioners on the part of the provisional government. It was submitted by President Harrison to the Senate February 15, 1893.<sup>e</sup> In his message of transmission he stated that the

<sup>a</sup> For. Rel. 1894, App. II. 664.

<sup>b</sup> For. Rel. 1894, App. II. 1168.

<sup>c</sup> For. Rel. 1891, 644, 648, 649; id. 1894, App. II. 26, 1166.

<sup>d</sup> Mr. Blaine, Sec. of State, to Mr. Stevens, min. to Hawaii, February 28, 1891, For. Rel. 1894, App. II. 1176. See, also, Mr. Foster, Sec. of State, to Sec. of Navy, Nov. 5, 1892, 189 MS. Dom. Let. 98.

<sup>e</sup> President Harrison, in his annual message of Dec. 6, 1889, said: "Our relations with Hawaii have been such as to attract an increased interest, and must continue to do so. I deem it of great importance that the projected submarine cable, a survey for which has been made, should be promoted. Both for naval and commercial uses we should have quick communication with Honolulu. We should before this have availed ourselves of the concession, made many years ago to this Government, for a harbor and naval station at Pearl River. Many evidences of the friendliness of the Hawaiian Government have been given in the past, and it is gratifying to believe that the advantage and necessity of a continuance of very close relations is appreciated." See, also, President Harrison's annual message of Dec. 9, 1891. In 1890 Mr. Carter, the Hawaiian minister at Washington, was appointed by his government as a delegate to the International American Conference, but too late to permit him to take part in its proceedings. (Mr. Blaine, Sec. of State, to Mr. Carter, Hawaiian min., May 3, 1890, MS. Notes to Hawaii, I. 154.)

overthrow of the monarchy was not in any way promoted by the United States, but had its origin in what seemed to be a reactionary and revolutionary policy on the part of Queen Liliuokalani, which put in serious peril not only the large and preponderating interests of the United States in the islands, but all foreign interests, and indeed the decent administration of civil affairs and the peace of the islands. President Harrison further said: “

“It is quite evident that the monarchy had become effete and the Queen’s government so weak and inadequate as to be the prey of designing and unscrupulous persons. The restoration of Queen Liliuokalani to her throne is undesirable, if not impossible, and unless actively supported by the United States would be accompanied by serious disaster and the disorganization of all business interests. The influence and interest of the United States in the islands must be increased and not diminished.

“Only two courses are now open; one the establishment of a protectorate by the United States, and the other, annexation full and complete. I think the latter course, which has been adopted in the treaty, will be highly promotive of the best interests of the Hawaiian people, and is the only one that will adequately secure the interests of the United States. These interests are not wholly selfish. It is essential that none of the other great powers shall secure these islands. Such a possession would not consist with our safety and with the peace of the world.

“This view of the situation is so apparent and conclusive that no protest has been heard from any government against proceedings looking to annexation. Every foreign representative at Honolulu promptly acknowledged the provisional government, and I think there is a general concurrence in the opinion that the deposed queen ought not to be restored. Prompt action upon this treaty is very desirable.”

The details of the transactions were more fully set forth in a report of Mr. Foster to the President. Although there had existed for a long while an unsettled state of affairs, the change in the government of Hawaii was, said Mr. Foster, entirely unexpected so far as the United States was concerned; and the American minister at Honolulu, Mr. Stevens, had at no time been instructed with regard to his course in the event of a revolutionary uprising. The change was also unlooked for by the commander of the U. S. S. *Boston*, who, under the impression that all disturbances had been allayed, had a few days previously quitted the capital with the American minister for a brief excursion to a neighboring island. On his return to Honolulu, January 4, 1893, he found affairs in a crisis. An armed conflict seemed possible at any moment, but it was not till late in the afternoon of

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“For. Rel. 1894, App. II. 198.

Monday, January 16, after the request for protection had been made by many citizens of the United States, that a force of marines was landed from the *Boston* by direction of the minister and in conformity with the standing instructions which, for many years, had authorized the naval forces of the United States to cooperate with the legation for the protection of American lives and property in case of imminent disorder. The marines when landed took no part whatever toward influencing the course of events. They remained isolated and inconspicuous till the provisional government had succeeded and had organized an adequate protective force, nor was any public recognition accorded to the provisional government by the United States minister till the Queen had abdicated and the provisional government had secured "effective possession of the government buildings, the archives, the treasury, the barracks, the police station, and all potential machinery of the government."<sup>a</sup>

President Cleveland on March 9, 1893, withdrew the treaty from the Senate for examination.<sup>b</sup> At the same time he sent  
Withdrawal of  
the treaty. Mr. James H. Blount, lately chairman of the House Committee on Foreign Affairs, to the islands as a special commissioner. In all matters pertaining to the relations of the United States to the existing or other government of the islands, and the protection of American citizens therein, the authority of Mr. Blount was stated to be "paramount;" but the minister, Mr. Stevens, was to continue in the conduct of the usual functions of the legation, not inconsistent with Mr. Blount's powers, until further notice. On May 22 Mr. Blount was appointed envoy extraordinary and minister plenipotentiary to the Hawaiian Islands, with a letter of credence to the president of the provisional government.<sup>c</sup> On and after April 6 Mr. Blount made numerous and full reports of the results of his investigation.<sup>d</sup> Their purport was summed up in a report of Mr. Gresham, Secretary of State, to President Cleveland, October 18, 1893. The statements made in Secretary Foster's reports were, said Mr. Gresham, based upon information received from Mr. Stevens and the Hawaiian special commissioners. But, according to the evidence contained in Mr. Blount's reports, those statements were "contradicted by declarations and letters of President Dole and other annexationists, and by Mr. Stevens's own verbal admissions." The provisional government, said Mr. Gresham, was recognized when it had little other than a paper existence, and "when the legitimate govern-

<sup>a</sup> Report of Mr. Foster, Sec. of State, S. Ex. Doc. 76, 51 Cong. 2 sess.; For. Rel. 1894, App. II. 198-205. See, also, Mr. Foster, Sec. of State, to Mr. Phelps, min. to Germany, tel., Feb. 1, 1893, MS. Inst. Germany, XVIII. 654.

<sup>b</sup> For. Rel. 1894, App. II. 1190.

<sup>c</sup> For. Rel. 1894, App. II. 467, 1185, 1187, 1188.

<sup>d</sup> For. Rel. 1894, App. II. 470-1150.

ment was in full possession and control of the palace, the barracks, and the police station;" and the presence of the American troops, who were landed without permission of the existing government, was used for the purpose of inducing the surrender of the Queen, who abdicated under protest with the understanding that her case would be submitted to the President of the United States. In conclusion, Mr. Gresham said:

"Should not the great wrong done to a feeble but independent state by an abuse of the authority of the United States be undone by restoring the legitimate government? Anything short of that will not, I respectfully submit, satisfy the demands of justice. . . . Our Government was the first to recognize the independence of the islands, and it should be the last to acquire sovereignty over them by force and fraud."<sup>a</sup>

On the day on which this report was made Mr. Gresham instructed Mr. Willis, who had been appointed to succeed Mr. Blount as minister to the islands, that the President would not send back the treaty to the Senate for its action. Mr. Willis was directed to acquaint the Queen with this determination, and to make known to her the President's regret that "the reprehensible conduct of the American minister and the unauthorized presence on land of a military force of the United States obliged her to surrender her sovereignty, for the time being, and rely on the justice of this Government to undo the flagrant wrong." Mr. Willis was, however, also to inform the Queen that the President would expect her, when reinstated, to pursue a magnanimous course by granting full amnesty to all who participated in the movement against her and to assume all obligations created by the provisional government. Having secured the Queen's assent to this course, Mr. Willis was then to advise the provisional government of the President's decision, which their action and that of the Queen were understood to have devolved upon him, and of his expectation that they would promptly relinquish to her her constitutional authority. Should the Queen decline to pursue the course suggested, or should the provisional government refuse to abide by the President's decision, Mr. Willis was to report the facts and await further instructions. He was subsequently directed to inform the Queen that the President could not use force to restore her without authority of Congress.<sup>b</sup>

When Mr. Willis, on November 13, 1893, made to the Queen the communication with which he was intrusted, she refused to grant an amnesty to those who had been instrumental in the overthrow of

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<sup>a</sup> For. Rel. 1894, App. II. 459, 463. For the full correspondence respecting affairs in Hawaii, see S. Ex. Docs. 13, 46, 57, 65, 77; H. Ex. Docs. 47, 48, 70, 76, 79, 95, 112, 140; S. Report 227, and H. Report 243, parts 1 and 2—all 53 Cong. 2 sess.

<sup>b</sup> For. Rel. 1894, App. II. 463, 465.

her government. "I have no legal right to do that," she said, "and I would not do it. These people were the cause of the revolution and constitution of 1887. There will never be any peace while they are here. They must be sent out of the country, or punished, and their property confiscated." The legal objection mentioned by the Queen was supposed to relate to the provision of the penal code by which death and confiscation of property were made the penalty of treason. In view of the nature of the Queen's response Mr. Willis awaited further instructions. A month later the Queen gave her unqualified assent in writing to the conditions suggested by President Cleveland,<sup>a</sup> but the provisional government refused to acquiesce in his conclusion, on the ground (1) that it involved an inadmissible interference in the domestic affairs of Hawaii, and with the provisional government, which had been formally recognized and treated with by the United States; (2) that there was no understanding on either side to submit the question of the restoration of the Queen to the President of the United States; (3) that Mr. Blount's report, on which the President's conclusion was based, had not been communicated to the provisional government, and that there had not been such an investigation and hearing of the case as would be essential to the formation of a correct opinion; (4) that the revolution of January, 1893, was the result of an attempted *coup d'état* of the Queen, who sought to overthrow the constitution of 1887, and that it would have taken place if the United States forces had been absent.<sup>b</sup>

Meanwhile, President Cleveland had submitted the matter to Congress in a message, dated December 18, 1893.<sup>c</sup> Referring to his course in withdrawing the treaty of annexation from the Senate, he stated that he had been influenced (1) by the "contemplated departure from unbroken American tradition in providing for the addition to our territory of islands of the sea more than 2,000 miles removed from our nearest coast," and (2), while that consideration might not of itself "call for interference with the completion of a treaty entered upon by a previous administration," by the fact that it appeared from the documents accompanying the treaty, when submitted to the

<sup>a</sup> For. Rel. 1894, App. II. 1242, 1262, 1269, 1270.

<sup>b</sup> For. Rel. 1894, App. II. 1276-1282.

<sup>c</sup> In his annual message, Dec. 4, 1893, President Cleveland referred to the overthrow of the native government in Hawaii, the negotiation of the treaty of annexation and his withdrawal of it from the Senate, the appointment of Mr. Blount and the result of his investigations, and the giving of "appropriate instructions" to the new minister to Hawaii with a view "to undo the wrong that had been done by those representing us and to restore as far as practicable the status existing at the time of our forcible intervention." He stated that additional advices were soon expected, and that when received they would be communicated to Congress with a special message.

Senate, "that the ownership of Hawaii was tendered to us by a provisional government set up to succeed the constitutional ruler of the islands, who had been dethroned, and it did not appear that such provisional government had the sanction of either popular revolution or suffrage." Two other features of the transaction, he said, naturally attracted attention; one was "the extraordinary haste—not to say precipitancy—characterizing all the transactions connected with the treaty." Between the "initiation of the scheme for a provisional government in Hawaii on the 14th day of January and the submission to the Senate of the treaty of annexation concluded with such Government, the entire interval was thirty-two days, fifteen of which were spent by the Hawaiian commissioners in their journey to Washington." Upon the evidence before him, President Cleveland expressed the conclusion that Hawaii was taken possession of by the United States forces "without the consent or wish of the Government of the islands, or of anybody else so far as shown, except the United States minister;" that the provisional government was recognized by the United States minister pursuant to prior agreement, at a time when it was "neither a government *de facto* nor *de jure*;" that the Queen was then in full possession of all the powers of government, and that she was induced to abdicate, with the concurrence of the representatives of the provisional government, with the understanding that her cause would thereafter be reviewed at Washington.

When this message was sent in, information had been received of the refusal of the Queen to accede to the conditions prescribed by the President for her restoration, but not of her later acquiescence, which had just then been expressed. The President referred to the check thus given to his plans, and concluded with the assurance that he should be "much gratified to cooperate in any legislative plan which may be devised for the solution of the problem before us which is consistent with American honor, integrity, and morality."<sup>a</sup>

March 15, 1894, an act was passed by the provisional government to provide for the election and assembling of delegates to a constitutional convention. Such a convention met at Honolulu May 30, 1894. It adjourned on the 5th of the following July, having been in session twenty-four days, and adopted a constitution which was proclaimed on the 4th of July.<sup>b</sup>

"Since communicating the voluminous correspondence in regard to Hawaii and the action taken by the Senate and House of Representatives on certain questions submitted to the judgment and wider discretion of Congress, the organization of a government in place of the provisional arrangement which followed the deposition of the Queen

<sup>a</sup> For. Rel. 1892, App. II. 445-458, 1262.

<sup>b</sup> For. Rel. 1894, App. II. 1317, 1350.

has been announced with evidence of its effective operation. The recognition usual in such cases has been accorded the new Government."<sup>a</sup>

January 9, 1895, President Cleveland submitted to Congress a message in relation to the desire of the Hawaiian Government to lease Necker Island, one of the uninhabited islands belonging to the group, as a station for a submarine cable to be laid from Canada to Australia, with a connection between that island and Honolulu. It was admitted that by the reciprocity treaty the lease could not be effected without the consent of the United States; but, in view of "the advantages to be gained by isolated Hawaii through telegraphic communication with the rest of the world," it was recommended that the request of the Hawaiian Government be granted.<sup>b</sup> The necessary consent was not given.

In January, 1895, a native revolt was attempted near Honolulu, led by the "half-white Hawaiian rebels, Nowlein, Bertlemann, Warren, and others."<sup>c</sup> It was their intention to march on Honolulu on Monday, the 7th of the month. A police raid, however, on Bertlemann's house at Waikiki, disconcerted their plans. The Government took prompt and vigorous measures, and instituted on January 17 a military commission of seven members, martial law having been declared. By the end of January, 38 persons had been tried, of whom five claimed to be citizens of the United States and one an Englishman, while the rest were half-castes and Hawaiians. Various persons were also expelled. The ex-Queen was arrested and held a prisoner in the executive building, formerly the palace. On the 24th of January she sent the Government a letter, disclaiming any connection with the revolt, recognizing the Republic, and renouncing all claims and pretensions, political or otherwise, "excepting only such rights and privileges as belong to me in common with all private citizens or residents in the Republic of Hawaii;" and she also presented an oath of allegiance to the Republic.<sup>d</sup> Martial law was maintained till March 18, 1895.<sup>e</sup> Among those convicted by the military court of complicity in the attempted uprising was ex-Queen Liliuokalani. In October, 1896, she received a full pardon, relieving her of a \$5,000 fine imposed by the court and restoring her to all the rights of Hawaiian citizenship.<sup>f</sup> This appears to have constituted the final chapter in the history of the revolt.<sup>g</sup>

<sup>a</sup> President Cleveland, annual message, Dec. 3, 1894.

<sup>b</sup> For. Rel. 1894, App. II. 1375.

<sup>c</sup> For. Rel. 1895, II. 818, et seq.

<sup>d</sup> For. Rel. 1895, II. 820-825.

<sup>e</sup> For. Rel. 1895, II. 818-867. See also For. Rel. 1894, App. II. 1391, 1396. Feb. 16, 1895, Mr. Willis, United States minister at Honolulu, reported that about a hundred persons had been tried by the commission, and that there were about two hundred political prisoners besides. (For. Rel. 1895, II. 832.)

<sup>f</sup> For. Rel. 1896, 388.

<sup>g</sup> Report of Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxxv.



By article 32 of the constitution promulgated in 1894, the President of the Republic of Hawaii was expressly authorized and empowered, with the approval of the cabinet, "to make a treaty of political or commercial union," with the United States, subject to ratification in legal form.

Signature of annexation treaty,  
June 16, 1897.

A new treaty of annexation was concluded at Washington, June 16, 1897. It was signed on the part of the United States by Mr. Sherman, Secretary of State, and by three commissioners on the part of Hawaii. It was submitted by President McKinley to the Senate on the same day, with a message in which he said:

"Not only is the union of the Hawaiian territory to the United States no new scheme, but it is the inevitable consequence of the relation steadfastly maintained with that mid-Pacific domain for three-quarters of a century. Its accomplishment, despite successive denials and postponements, has been merely a question of time. While its failure in 1893 may not be a cause of congratulation, it is certainly a proof of the disinterestedness of the United States, the delay of four years having abundantly sufficed to establish the right and the ability of the Republic of Hawaii to enter, as a sovereign contractant, upon a conventional union with the United States, thus realizing a purpose held by the Hawaiian people and proclaimed by successive Hawaiian governments through some seventy years of their virtual dependence upon the benevolent protection of the United States. Under such circumstances, annexation is not a change; it is a consummation."<sup>a</sup>

"The Senate having removed the injunction of secrecy, although the treaty is still pending before that body, the subject may be properly referred to in this message because the necessary action of the Congress is required to determine by legislation many details of the eventual union, should the fact of annexation be accomplished, as I believe it should be. . . . That treaty was unanimously ratified without amendment by the Senate and President of the Republic of Hawaii on the 10th of September last, and only awaits the favorable action of the American Senate to effect the complete absorption of the islands into the domain of the United States. What the conditions of such a union shall be, the political relation thereof to the United States, the character of the local administration, the quality and degree of the elective franchise of the inhabitants, the extension of the Federal laws to the territory or the enactment of special laws to fit the peculiar condition thereof, the regulation if need be of the labor system therein, are all matters which the treaty has wisely relegated to the Congress.

"If the treaty is confirmed, as every consideration of dignity and honor requires, the wisdom of Congress will see to it that, avoiding

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<sup>a</sup>S. Ex. E, 55 Cong. 1 sess. Similar statements may be found in President McKinley's annual messages of Dec. 6, 1897, and Dec. 5, 1898.

abrupt assimilation of elements perhaps hardly yet fitted to share in the highest franchises of citizenship, and having due regard to the geographical conditions, the most just provisions for self-rule in local matters with the largest political liberties as an integral part of our nation will be accorded to the Hawaiians. No less is due to a people who, after nearly five years of demonstrated capacity to fulfill the obligations of self-governing statehood, come of their free will to merge their destinies in our body-politic.

"The questions which have arisen between Japan and Hawaii by reason of the treatment of Japanese laborers emigrating to the islands under the Hawaiian-Japanese convention of 1888, are in a satisfactory stage of settlement by negotiation. This Government has not been invited to mediate, and on the other hand has sought no intervention in that matter, further than to evince its kindest disposition toward such a speedy and direct adjustment by the two sovereign states in interest as shall comport with equity and honor. It is gratifying to learn that the apprehensions at first displayed on the part of Japan lest the cessation of Hawaii's national life through annexation might impair privileges to which Japan honorably laid claim, have given place to confidence in the uprightness of this Government, and in the sincerity of its purpose to deal with all possible ulterior questions in the broadest spirit of friendliness."

President McKinley, Ann. Message, Dec. 6, 1897.

The apprehensions of Japan, referred to in the preceding message, were expressed in certain communications made by the Japanese minister at Washington to the Department of State. The Japanese Government took the ground (1) That the maintenance of the status quo in Hawaii was essential to the good understanding of the powers having interests in the Pacific; and (2) that the absorption of the islands by the United States would tend to endanger certain rights of Japanese subjects in the group, under its treaties, constitution, and laws, and might result in postponing the settlement of claims and liabilities existing in favor of Japan under treaty stipulations. At the same time the Japanese Government took occasion to deny "the mischievous suggestion or report" that it entertained designs against the territorial integrity or the sovereignty of the islands.

The Government of the United States, while declaring this assurance to have been entirely unnecessary, since no doubt could be entertained as to "the sincerity and friendliness of Japan in all that concerns her relation to the United States and to the Hawaiian Islands," replied (1) That, while the treaties of Hawaii would fall with annexation, this would not extinguish any "vested rights" previously acquired under them; and (2) that, during three-quarters of a century, in which the

Protest of Japan  
and its with-  
drawal.

government and commerce of the islands had undergone notable changes, the one essential feature of the status quo had been the predominant and paramount influence of the United States, ultimate political union being often foreshadowed and recognized as a necessary contingency; that when, four years previously, a similar project of annexation was entertained no objection was suggested by any power having interests in the Pacific; and that it could not be admitted that "the projected more perfect union of Hawaii to the United States by which the progressive policies and dependent associations of some seventy years have their destined culmination can injure any legitimate interests of other powers." On the contrary, it was expected "to strengthen, develop, and perpetuate all such commonly beneficial interests."<sup>a</sup>

"I regret to note that your Government, notwithstanding the candid statements made in my note of June 25th, continues to insist that the maintenance of what it terms the status quo of Hawaii is essential to the good understanding of the powers which have interests in the Pacific. I pointed out that the proposed annexation was nothing more than the culmination of an avowed policy, announced and furthered by successive monarchical and republican governments of the Hawaiian Islands and pursued on the part of the United States through a long series of years. The fact cited of 'the augmentation that has taken place in the interests of Japan in the Pacific,' can not properly be advanced as a reason why the policy so long declared and pursued should be abandoned just on the eve of its realization. This augmentation of Japanese interests has taken place in the knowledge of certain well known historical facts, among which the following may be enumerated. More than half a century ago, the Government of the United States announced to the world that its interest in the Hawaiian Islands was predominant, and that it could not regard with indifference any attempt to interfere with that interest, a position which has been constantly and continuously maintained. This was soon followed by a declination on its part to unite with England and France in a guarantee of the independence and autonomy of the islands. Not long thereafter one of the native kings authorized the negotiation of a treaty of annexation to the United States, which was not at that time consummated because of his untimely death. After repeated solicitation on the part of Hawaiian sovereigns, a treaty of commercial reciprocity was negotiated by one of them with the United States more than twenty years ago, which not only made the islands for commercial

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<sup>a</sup> Mr. Sherman, Sec. of State, to Mr. Toru Hoshi, Jap. min., June 25, 1897, MS. Notes, to Jap. Leg. I. 521. See, also, Mr. Sherman, Sec. of State, to Mr. Sewall, min. to Hawaii, May 26, 1897, MS. Inst. Hawaii, III. 318; Mr. Sherman, Sec. of State, to Mr. Dun, min. to Japan, tel., June 25, 1897, MS. Inst. Japan, IV. 426; Mr. Sherman, Sec. of State, to Mr. Buck, min. to Japan, June 26, 1897, id. 427.

purposes practically a part of the United States, but contained clauses of territorial rights exclusively enjoyed by the United States as against all other nations. The purpose and effect of this treaty was understood in the United States to be to prepare the way for complete political union at the proper time. When the present Government of Hawaii was established it declared its intention to bring about annexation to the United States at the earliest practicable moment, and it inserted a clause to that effect in its constitution. Under these conditions Japanese immigration to and commerce with the islands began and have been augmented to their present proportions. It may be added that a very large proportion of the immigration has taken place and the commerce grown up since the present Hawaiian Government was established. The Japanese Government permitted and encouraged the immigration of its subjects and the growth of its commerce under these conditions, and with a full knowledge of the policy of the United States as to these matters. It can have therefore no well-founded cause of complaint if only the usual and legitimate results flow from the proposed annexation. . . .

“Neither should your Government entertain any anxiety as to the treatment which its commerce will receive at the hands of the United States. We have welcomed the establishment of one line of Japanese steamers to our Pacific coast, and hope that others may follow. Such development is perfectly natural, as to-day and for many years past the United States has afforded a large and more profitable market than any other country for Japanese products. On the other hand, it has been a source of regret that relatively so small a part of the import trade of Japan is made up of American products. Increased transportation facilities will, it is hoped, improve this state of the trade, and it will be the aim of the United States to do all that is possible, consistent with its domestic policy, to stimulate and enlarge reciprocal commerce. The annexation of the islands will necessarily constitute a coastwise trade, but there is no reason to expect that the expanding commerce of Japan will be materially hampered by the political union which must have been foreseen and which is the natural result of more than a half a century of preparation.

“There only remains one other point of your note which seems to call for a reply. You express the fear that the consummation of annexation might tend to delay an adjustment of claims for indemnity which Japan is now pressing upon Hawaii. I agree with you that if Japan has just and well-founded claims against Hawaii, the latter should not expect to evade them by an alteration in its political status. But I do not understand that such evasion is sought; on the contrary, Hawaii has offered to submit the question of liability to arbitration, and as this offer has been promptly accepted in principle, no unreasonable delay should be anticipated in the actual adjustment. . . .

"I trust that if the foregoing statement has not entirely satisfied the wishes of Count Okuma, under whose instruction your note, to which this is a reply, was written, it will at least convince him that, in the annexation of the Hawaiian islands to the United States, the Government of the latter is not inspired by any feeling of hostility to Japan, or by any desire to restrict the legitimate sphere of its influence in the Pacific; that its subjects in those islands will be accorded all the rights and protection to which they are entitled under international law and which they have reason to expect from the past friendly conduct of the United States, and that every proper effort will be made to encourage and enlarge the commercial relations of the two countries, destined to nearer and more intimate intercourse with each other in the future."

Mr. Sherman, Sec. of State, to Mr. Toru Hoshi, Jap. min., August 14, 1897, MS. Notes to Jap. Leg. I. 533. See, also, Mr. Blaine, Sec. of State, to Mr. Comly, min. to Hawaii, June 13 and June 24, 1881, MS. Inst. Hawaii, II. 394, 497; Mr. Bayard, Sec. of State, to Mr. Merrill, min. to Hawaii, July 28, 1887, MS. Inst. Hawaii, III. 45.

"Mr. Sherman's understanding from these several communications and interviews is that the Government of Japan, not finding the declarations contained in the note on the same subject, which Mr. Sherman had the honor to address to Mr. Hoshi on the 14th of August last in response to inquiries of a like character theretofore made, as explicit as it had desired, wishes further information as to the attitude of this Government after the annexation of Hawaii, should that be accomplished, in regard to what had been termed 'the vested rights' of Japan in, and in respect to Hawaii, and the future status of the subjects of Japan in those islands. In communicating this wish of his Government, Mr. Hoshi conveys the gratifying assurance that the Government of Japan has no disposition to insist upon its opposition to annexation which had been announced in previous communications, and notably in Mr. Hoshi's note of July 10th last, perceiving in the assurances it had received from the Government of the United States in the correspondence which had passed, the purpose to deal with the rights and interests of Japan in Hawaii in a spirit of sincere friendliness. That assurance is now most cordially renewed.

"The nature of the inquiry now made will best appear by citing the language in which it is set forth in Mr. Hoshi's memorandum:

"The Imperial Government therefore desires to ascertain whether the United States Government can assure them that, in the event annexation becomes an accomplished fact, no discrimination of any nature which shall not apply to the commerce, navigation, subjects or citizens of other nations, shall be established or maintained as against the commerce, navigation or subjects of Japan in Hawaii."

"Besides this general aspect of the Japanese inquiry, the memorandum of Mr. Hoshi presents the special phase of the eventual disposition of the pending claims of Japan against Hawaii, growing out of

the treatment of Japanese immigrants to the Islands, and the imposition therein of a discriminating duty upon the Japanese wine, known as 'sake.' Here again, the terms of the inquiry will best appear by quoting the words of the memorandum itself.

"It is true, that the United States Government is not a party to this controversy, but the conditions are peculiar, and Mr. Hoshi feels that he is justified in calling attention to the solicitude which his Government naturally entertains. He has no intention of endeavoring to fix any contingent responsibility upon the United States, either directly or by implication, but under the circumstances he thinks that it is his duty to ascertain whether, in case annexation is completed before the claims are finally adjudicated, the United States is prepared to assume the responsibilities accruing to Hawaii in this behalf, and to satisfy the claims if they are found to be well established.'

"Taking up the latter point first as a matter of detail which may conveniently be gotten out of the way before proceeding to consider the main question put, Mr. Sherman deems it proper to say, that the President believes that, so far as Japan may have any legitimate claim for actual damages, it might be unfair to the Japanese Government were all responsibility for such claim to be annulled by the annexation of Hawaii to this country, and that, while this Government could not concede in advance that Japan would have any just ground for complaint in that contingency, it would be disposed, in the exercise of the constitutional powers which the Executive possesses in respect to international negotiations, to take up the matter with the Government of Japan, in the event of annexation being consummated, and endeavor to settle for any pecuniary claims which Japan might establish for an infraction of its rights to import goods into Hawaii, or as to its claim concerning the rejection of its subjects by the Hawaiian Government, approaching the matter in that spirit of candor and fairness which, if any such claim were found to be well grounded, would doubtless conduce to an amicable termination.

"Mr. Hoshi cannot be unaware that, under the constitutional system ruling in the United States, the essential matters treated of in the memorandum would, in the event of annexation, be the subject of action by the Congress, as the lawmaking power, and that the Executive has neither the power nor the disposition to limit the legislative branch of the Government by any expression of his own opinion or policy. The President feels only friendly sentiments toward Japan and its people. Nothing in the past history of the relations between this country and Japan shows any other sentiment on the part of the legislative or any other branch of our Government. On the contrary, as is amply recognized in the note of the Imperial Japanese Minister for Foreign Affairs which accompanies Mr. Hoshi's memorandum, Japan has always confidently counted, and not in vain, upon the friend-

ship and friendly support of the United States, and bonds of good will and mutual esteem have long and firmly united Japan and America.

"This country has never shown any inclination to discriminate against Japanese subjects in its legislation heretofore, nevertheless the matter so far as the present question is concerned must be left entirely to the legislative action by the proper department of this Government after annexation, if that should occur. The Executive has no right to conclude the Congress, or to make any compact that would assume to do so.

"In the interviews which Mr. Hoshi has had with Mr. Sherman and Mr. Day, it has been pointed out to him that, in the event of annexation, or in any event, there would be but a short interval before the 17th of July, 1899, the date of the taking effect of the new treaty between the United States and Japan, which, as Mr. Hoshi concedes, secures and defines the rights of Japanese subjects in this country. If, during this brief interval, the Hawaiian Islands should be admitted to become a part of the domain of the United States, much would have to be done in the way of determining the conditions of their union. The pending treaty of annexation, as Mr. Hoshi is probably aware, does not determine the future political status of the islands. Everything, even as to the character and form of their government, is left to be prescribed and regulated by legislation, the details of which yet remain to be considered. With so large and important a task before it, hasty or improvident action by the Congress is not to be apprehended in any matter, especially if affecting the well being of the newly acquired domain and the encouragement and development of its industries and natural resources, in which the material interests of this country and of its citizens are already so intimately concerned. It is not to be apprehended that the Executive would advise any such action.

"In conclusion, Mr. Sherman points to the intimation, contained in the President's annual message to the Congress at the opening of their present session, as to the uprightness and sincerity of the purpose of this Government to deal with all possible ulterior questions affecting the rights of Japan in the Hawaiian Islands in the broadest spirit of friendliness."

Memorandum of Mr. Sherman, Sec. of State, to Mr. Toru Hoshi, Jap. min., Jan. 8, 1898, MS. Notes to Jap. Leg. I. 545.

"Pending the consideration by the Senate of the treaty signed June 16, 1897, by the plenipotentiaries of the United States and of the Republic of Hawaii, providing for the annexation of the islands, a joint resolution to accomplish the same purpose by accepting the offered cession and incorporating the ceded territory into the Union was adopted by the Congress and approved July 7, 1898. I thereupon

Joint resolution of  
annexation, July  
7, 1898.

directed the U. S. S. *Philadelphia* to convey Rear-Admiral Miller to Honolulu, and intrusted to his hands this important legislative act, to be delivered to the President of the Republic of Hawaii, with whom the Admiral and the United States minister were authorized to make appropriate arrangements for transferring the sovereignty of the islands to the United States. This was simply but

Transfer of sovereignty, Aug. 12, 1898.

impressively accomplished on the 12th of August last, by the delivery of a certified copy of the resolution to President Dole, who thereupon yielded up to the representative of the Government of the United States the sovereignty and public property of the Hawaiian Islands.

“Pursuant to the terms of the joint resolution and in exercise of the authority thereby conferred upon me, I directed that the civil, judicial, and military powers theretofore exercised by the officers of the Government of the Republic of Hawaii should continue to be exercised by those officers until Congress shall provide a government for the incorporated territory, subject to my power to remove such officers and to fill vacancies. The President, officers, and troops of the Republic thereupon took the oath of allegiance to the United States, thus providing for the uninterrupted continuance of all the administrative and municipal functions of the annexed territory until Congress shall otherwise enact.

“Following the further provision of the joint resolution, I appointed the Honorables Shelby M. Cullom, of Illinois, John T. Morgan, of Alabama, Robert R. Hitt, of Illinois, Sanford B. Dole, of Hawaii, and Walter F. Frear, of Hawaii, as commissioners to confer and recommend to Congress such legislation concerning the Hawaiian Islands as they should deem necessary or proper. The commissioners having fulfilled the mission confided to them, their report will be laid before you at an early day. . . .

“Under the provisions of the joint resolution, the existing customs relations of the Hawaiian Islands with the United States and with other countries remain unchanged until legislation shall otherwise provide. The consuls of Hawaii, here and in foreign countries, continue to fill their commercial agencies, while the United States consulate at Honolulu is maintained for all appropriate services pertaining to trade and the revenue. It would be desirable that all foreign consuls in the Hawaiian Islands should receive new exequaturs from this Government.

“The attention of Congress is called to the fact that our consular offices having ceased to exist in Hawaii, and being about to cease in other countries coming under the sovereignty of the United States, the provisions for the relief and transportation of destitute American seamen in these countries under our consular regulations will in consequence terminate. It is proper, therefore, that new legislation



should be enacted upon this subject, in order to meet the changed conditions."

President McKinley, Ann. Message, Dec. 8, 1898. See the report of the Hawaiian Commission, S. Doc. 16, 55 Cong. 3 sess.

The Treasury Department issued, Aug. 4, 1898, a circular relating to trade with Hawaii.

"Some embarrassment in administration has occurred by reason of the peculiar status which the Hawaiian Islands at present occupy under the joint resolution of annexation approved July 7, 1898. While by that resolution the Republic of Hawaii as an independent nation was extinguished, its separate sovereignty destroyed, and its property and possessions vested in the United States, yet a complete establishment for its government under our system was not effected. While the municipal laws of the islands not enacted for the fulfillment of treaties and not inconsistent with the joint resolution or contrary to the Constitution of the United States or any of its treaties remain in force, yet these laws relate only to the social and internal affairs of the islands, and do not touch many subjects of importance which are of a broader national character. For example, the Hawaiian Republic was divested of all title to the public lands in the islands, and is not only unable to dispose of lands to settlers desiring to take up homestead sites, but is without power to give complete title in cases where lands have been entered upon under lease or other conditions which carry with them the right to the purchaser, lessee, or settler to have a full title granted to him upon compliance with the conditions prescribed by law or by his particular agreement of entry.

"Questions of doubt and difficulty have also arisen with reference to the collection of tonnage tax on vessels coming from Hawaiian ports; with reference to the status of Chinese in the islands, their entrance and exit therefrom; as to patents and copyrights; as to the register of vessels under the navigation laws; as to the necessity of holding elections in accordance with the provisions of the Hawaiian statutes for the choice of various officers, and as to several other matters of detail touching the interests both of the islands and of the Federal Government.

"By the resolution of annexation the President was directed to appoint five commissioners to recommend to Congress such legislation concerning the islands as they should deem necessary or proper. These commissioners were duly appointed and after a careful investigation and study of the system of laws and government prevailing in the islands, and of the conditions existing there, they prepared a bill to provide a government under the title of "The Territory of Hawaii." The report of the Commission, with the bill which they prepared, was transmitted by me to Congress on December 6, 1898, but the bill still awaits final action.

“The people of these islands are entitled to the benefits and privileges of our Constitution, but in the absence of any act of Congress providing for Federal courts in the islands, and for a procedure by which appeals, writs of error, and other judicial proceedings necessary for the enforcement of civil rights may be prosecuted, they are powerless to secure their enforcement by the judgment of the courts of the United States. It is manifestly important, therefore, that an act shall be passed as speedily as possible erecting these islands into a judicial district, providing for the appointment of a judge and other proper officers and methods of procedure in the appellate proceedings, and that the government of this newly acquired territory under the Federal Constitution shall be fully defined and provided for.”

President McKinley, Third Annual Message, Dec. 5, 1899.

By an executive order of Sept. 11, 1899, President McKinley directed that all proceedings for the sale or disposition of public lands in Hawaii should be discontinued; and that if any sales or agreements of sale thereof had been made since the adoption of the resolution of annexation, the purchaser should be notified that they were null and void, any consideration paid to the local authorities to be refunded. (Mr. Hill, Acting Sec. of State, to the Sec. of the Interior, Oct. 10, 1899, 240 MS. Dom. Let. 450.)

As to lands in Honolulu for naval purposes, see proclamation of Nov. 10, 1899.

By another executive order of May 13, 1899, the general election provided for by the Hawaiian constitution, to be held on the last Wednesday in the ensuing September, was suspended, and elective officers were continued in their places. (Mr. Cridler, Third Assist. Sec. of State, to Mr. Kahn, Feb. 23, 1900, 243 MS. Dom. Let. 181.)

A government for the Territory of Hawaii was provided by the act of Congress of April 30, 1900.

See H. Report 305, 56 Cong. 1 sess.

As to the extension of the laws relating to commerce, navigation, and merchant seamen over the Hawaiian Islands, see House Report 1694, 53 Cong. 3 sess.

A decree in admiralty of the supreme court of Hawaii in a case pending in the Hawaiian courts at the time of the annexation is not subject to an appeal to the United States circuit court of appeals for the ninth circuit. (Ex parte Wilder's Steamship Co. (1902), 183 U. S. 545.)

As to the extension of customs and internal-revenue laws over the islands, see House Report 1683, 53 Cong. 3 sess.

Information as to the Hawaiian land system may be found in S. Doc. 72, 56 Cong. 1 sess.

**Provisional measures; consular representation.** “The United States minister at Honolulu ceased to discharge his diplomatic functions on July 4, 1898.”

Mr. Hay, Sec. of State, to Mr. Buchanan, min. to Argentine Rep., Nov. 17, 1898, For. Rel. 1898. The date in this quotation should be August 12, 1898. On that day the ceremonial transfer of sovereignty took place, and Mr. Sewall, United States minister at Honolulu, his diplomatic functions ceasing, was provisionally invested with the character of agent of the United States, pending further legislation by Congress.

December 9, 1898, the embassy of the United States at Berlin reported that some time previously, no official information having been received of the annexation of the islands, it had declined to grant a passport to a citizen of the Hawaiian Islands, although it was known that a law had been passed to make them a part of the United States. The applicant subsequently obtained a passport from Mr. Glade, the Hawaiian chargé d'affaires and consul-general in Berlin.

The embassy also reported that at the then recent opening of the Reichstag, to which the diplomatic corps received a formal invitation, the Hawaiian chargé was present, and that his name still appeared in the official list of the diplomatic corps. The embassy requested instructions.

The Department of State replied:

"As stated in my telegram of the 4th instant, the diplomatic functions of the Hawaiian representative as chargé d'affaires ceased upon the annexation of the islands. With reference to his commercial capacity, I enlarge upon my telegrams as follows:

"By the joint resolution of Congress, approved July 7, 1898, providing for the annexation of the Hawaiian Islands to the United States, it is provided that 'until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands, the customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.'

"This Government had regarded that provision of law as continuing the commercial relations of the Hawaiian Islands with other states pending such legislation by Congress concerning the Hawaiian Islands as may be deemed necessary or proper, and consequently the United States continues to conduct its commercial business through its own consular officer at Honolulu as a *de facto* commercial agent, while the Hawaiian consuls in this country continue to act in a similar capacity. Until the commercial dependency of the Hawaiian Islands upon the United States shall be regulated by law, it would seem desirable that the present representatives of the Hawaiian Islands should continue to discharge their commercial functions as such agents in foreign countries, and until such laws shall be passed this Government is not prepared to commission those consular officers as full consular officers of the United States or to merge their functions in those of existing consular representatives of the United States in the same localities.

"With regard, however, to the consular officers of foreign governments in the Hawaiian Islands the case is somewhat different, and inquiries on this point have been, in several instances, answered by expressing the opinion of this Government that it would be desirable for the existing foreign consuls in the Hawaiian Islands to receive new commissions from their governments, upon which this Government

could issue its exequatur covering the present provisional arrangement with respect to the commercial intercourse of Hawaii with foreign countries."

Mr. Hay, Sec. of State, to Mr. White, ambass. to Germany, Jan. 10, 1899, For. Rel. 1899, 295.

Statements substantially the same may be found in Mr. Hay, Sec. of State, to Baron von Riedenan, Austrian chargé, Dec. 13, 1898, MS. Notes to Aust. Leg. IX. 398.

See, also, Mr. Hay, Sec. of State, to Mr. Romano, Ital. chargé, Oct. 7, 1898, MS. Notes to Ital. Leg. IX. 300; Mr. Hay, Sec. of State, to Mr. Grip, min. of Sweden and Norway, Nov. 17, 1898, and Dec. 15, 1899, MS. Notes to Swedish Leg. VIII. 109, 149; Mr. Hay, Sec. of State, to Sir Julian Pauncefote, Brit. amb., Dec. 30, 1898, For. Rel. 1898, 585.

Mr. Hay, as Secretary of State, in a letter of January 27, 1899, informed Mr. Glade that, upon the annexation of the islands, his "diplomatic functions as the Hawaiian chargé d'affaires necessarily ceased," but that, under the terms of the joint resolution of July 7, 1898, his functions as consul-general would, till further legislation was enacted, "provisionally continue, subject to instructions to be given you by the Hawaiian Government, in all commercial matters, not inconsistent with the above referred to resolution, . . . until the commercial dependency of the Hawaiian Islands upon the United States shall be regulated by law." (234 MS. Dom. Let. 282. See, also, Mr. Hay, Sec. of State, to Mr. White, amb. to Germany, Jan. 27, 1899, MS. Inst. Germany, XX. 635.)

When the joint resolution of July 7, 1898, was passed, Mr. William Haywood was instructed, as United States consul-general at Honolulu, in view of the important connection of his office with the then-existing customs relations between the United States and Hawaii, to remain at his post till further notice. Again, on July 21, 1899, Mr. Hay, as Secretary of State, issued the following order:

"In view of the anomalous condition of affairs between the United States and the Hawaiian Islands arising in consequence of the act of Congress approved July 7, 1898, providing for the annexation of those islands, and the failure of Congress to provide a form of government therefor, it is hereby ordered, until action by Congress is taken to effect a change in the existing conditions with those islands, that William Haywood, appointed secretary of legation and consul-general of the United States at Honolulu, June 1, 1897, be directed to continue as consul-general and sign as such, as a measure of urgent and public necessity; and that his salary be paid as heretofore from the appropriation for the annexation of the Hawaiian Islands." (238 MS. Dom. Let. 562.)

Mr. Haywood's consular functions ceased at the close of June 13, 1900, the act of April 30, 1900, "to provide a government for the Territory of Hawaii," going into effect on the following day. (Mr. Cridler, Third Assist. Sec. of State, to Mr. Haywood, cons. gen. at Honolulu, May 23, 1900, 172 MS. Inst. to Consuls, 442.) The Department of State held that his consular bond would not cease to be in force "until after June 13, 1900, and then only upon the formal submission of his accounts and their auditing by the proper officers of the Treasury Department." (Mr. Cridler, Third Assist. Sec. of State, to the Fidelity and Casualty Co., May 31, 1900, 245 MS. Dom. Let. 345.)

Mr. W. P. Boyd, who was appointed vice and deputy consul-general at Honolulu, June 20, 1892, was also regarded as authorized to continue to perform

his duties as such after the joint resolution of July 7, 1898. (Mr. Adee, Second Assist. Sec. of State, to the Title Insurance & Trust Co., Oct. 18, 1899, 240 MS. Dom. Let. 548.)

The United States consul at Buenos Ayres, where the Hawaiian Government was never represented, was instructed to act for Hawaiian commercial intercourse so far as was necessary and proper. (Mr. Hay, Sec. of State, to Mr. Buchanan, min. to Argentine Rep., tel., Nov. 17, 1898, For. Rel. 1898, 6. See, also, Mr. Hay, Sec. of State, to Sec. of the Treasury, Nov. 16, 1898, 232 MS. Dom. Let. 577.)

“Cannot authorize captain [Hawaiian] schooner *Americana* hoist United States flag in absence Congressional legislation.  
**Hawaiian vessels.** Hawaii formally annexed August 12, but legislation necessary to carry into operation internal and foreign commercial arrangements.”

Mr. Hay, Sec. of State, to Mr. Buchanan, min. to Argentine Republic, tel., Nov. 21, 1898, For. Rel. 1898, 7.

It was held by the Treasury Department that Hawaiian vessels could not be considered as vessels of the United States without additional legislation. (Mr. Spaulding, Acting Sec. of the Treasury, to Mr. Hay, Sec. of State, Jan. 10, 1899; Mr. Hay, Sec. of State, to Mr. Buchanan, min. to Argentine Rep., Jan. 13, 1899, For. Rel. 1898, 9.)

“I enclose . . . a copy of the Executive order of the President dated the 18th instant, directing that ‘the issue of registers to vessels by the authorities of Hawaii, entitling such vessels to all the rights and privileges of Hawaiian vessels in the ports of nations or upon the high seas, shall hereafter cease.’

“For your further information I also enclose copy of the opinion of the Attorney-General upon which the President’s Executive order was issued.”

Mr. Adee, Acting Sec. of State, to Mr. Sewall, agent at Honolulu, Sept. 20 1899, MS. Inst. Hawaii, III. 476, enclosing copy of an opinion of the Attorney-General of Sept. 12, 1899. (Griggs, At.-Gen., 22 Op. 578.)

By sec. 98 of the act of April 30, 1900, “all vessels carrying Hawaiian registers on the 12th day of August, 1898, and which were owned bona fide by citizens of the United States, or the citizens of Hawaii, together with the following-named vessels claiming Hawaiian register, *Star of France*, *Euterpe*, *Star of Russia*, *Falls of Clyde*, and *Willscott*, shall be entitled to be registered as American vessels, with the benefits and privileges appertaining thereto.”

“I had the honor to receive your personal note of the 24th instant in which you express the apprehension of Her Majesty’s Government ‘lest one of the results of the annexation of the Hawaiian Islands to the United States may be to interfere with the carrying trade between those islands and the United States, no inconsiderable portion of which is now done in British bottoms.’ You state your understanding that there is at present nothing

to preclude foreign vessels from trading between the United States and the Hawaiian Islands and that no legislation is contemplated which would interfere with the trade, and request information on these points.

"As the question is one properly for the consideration of the Treasury Department, I referred your inquiries to the Secretary of the Treasury and am now in receipt of a letter from Acting Secretary Spaulding in reply.

"Your understanding that there is at present no regulation to preclude foreign vessels from such trade, coincides with the view of the Treasury Department, based on an opinion of the Attorney-General, set forth in the appended circulars.

"The Acting Secretary of the Treasury is, however, unable to concur in your further understanding that no legislation is contemplated which would interfere with this carrying trade. While he does not undertake to forecast the form which legislation by Congress may take, the general policy of this country to reserve to American vessels trade between American ports is so firmly established that its reaffirmation by Congress in the legislation providing for the extension of American laws to the Hawaiian Islands does not appear to him to be doubtful. He thinks it possible that this policy may be not put into effect until there has been an adjustment of American tonnage to meet the situation created by annexation, but he thinks it probable that at an early date trade between the United States and the Hawaiian Islands will be confined to American vessels.

"It may be noted that, in obedience to traditional policy, trade between the United States and Porto Rico has already by regulation been confined to American vessels.

"There would seem to be no occasion to apprehend serious interference with the carrying trade between the United States and the Hawaiian Islands as a result of such legislation as Congress may enact. The total combined entries and clearances of vessels from and to Hawaiian ports and ports of the United States during the fiscal year ended June 30, 1897, were 461 vessels of 361,173 net tons, of which 394 vessels of 283,211 net tons were American, and only 13 vessels of 19,040 tons were British. These figures do not include steamers which merely touch at Honolulu to leave or take on mail and a few cabin passengers and their baggage to and from Asiatic and Australian ports. With regard to these the American consul-general at Honolulu, under date of January 24, 1898, reported:

"The majority of these steamers are British, and as they carry very little freight to and from these islands it is misleading to include them in any report of the nationality of vessels employed by the Hawaiians in their commerce with the world."

By the act of April 30, 1900, "to provide a government for the Territory of Hawaii," the "coasting trade between the [Hawaiian] islands aforesaid and any other portion of the United States" is declared (sec. 98) to be "regulated in accordance with the provisions of law applicable to such trade between any two great coasting districts." By this legislation the transportation of cargo from the United States to Hawaii, and vice versa, is made subject to the laws of the United States relating to the coasting trade, which practically exclude foreign vessels. In reply to representations as to the injurious effect of this exclusion on Australasian-owned shipping, it was stated that the subject was not within the discretionary control of the Executive.

Mr. Hay, Sec. of State, to Lord Pauncefoot, British amb., March 20, 1901, For. Rel. 1901, 204. See, also, Mr. Hay, Sec. of State, to Lord Pauncefoot, Nov. 23, 1899, MS. Notes to British Leg. XXV. 9.

March 30, 1900, the Japanese legation at Washington represented that the extension to Japan of the prohibition decreed **Quarantine.** by the Hawaiian authorities against nearly all importations from Eastern countries, with a view to the suppression of the bubonic plague, was neither expedient nor just, and requested that such remedial action be taken by the United States as the gravity of the circumstances might warrant. The Department of State replied that the act providing for the annexation of the islands having left their commercial relations to continue under existing conditions till Congress should otherwise provide, the measures of which the Imperial Government complained would appear to have been adopted by the Hawaiian Government in the exercise of its provisional powers and without opportunity for the United States to prescribe or control the action taken. The United States, it was added, consequently was without information which would enable it to consider the grounds on which the Hawaiian measures rested, or to pronounce an opinion as to the merits of the complaint; but the Government of Hawaii would be informed of the communication and requested to report the facts and circumstances for the consideration of the Government of the United States.

Mr. Hay, Sec. of State, to Mr. Komura, Jap. Leg., April 4, 1900, MS. Notes to Jap. Leg. II. 1.

By the act of April 30, 1900, providing a government for the Territory of Hawaii, it was provided that quarantine stations should be established as directed by the Supervising Surgeon-General of the United States Marine-Hospital Service, and that quarantine regulations relating to the importation of diseases from other countries should be under the control of the Government of the United States, the general health laws remaining, however, in the jurisdiction of the Territorial government, subject to the quarantine laws and regulations of the United States.

After the passage of the joint resolution of annexation of July 7, 1898, and pending the adoption of further legislation by Congress, it was held that the immigration laws of the United States did not extend to the Hawaiian Islands, and that, till an act should be adopted for the purpose, the Treasury Department would have no authority to interfere with the arrival of immigrants there. It was added that when such legislation should be adopted it would not be within the power of the Treasury to except particular cases from its operation "merely upon considerations of humanity, however great the hardship of the consequences arising from a strict application of the law may appear."

Mr. Hay, Sec. of State, to Count Vinci, Italian chargé, Jan. 21, 1899, MS. Notes to Ital. Leg. IX. 322, quoting from a letter of the Acting Secretary of the Treasury.

Mr. Day, Assist. Sec. of State, to Mr. Sasse, April 21, 1898, stated, in reply to an inquiry, that there was no treaty between the United States and Japan whereby the United States was to control the immigration of Japanese into Hawaii after 1899. (227 MS. Dom. Let. 499.)

By section 8 of the joint resolution it was provided that "there shall be no further immigration of Chinese into the Hawaiian Islands except upon such conditions as are now or may hereafter be allowed by the United States." It was held by the Attorney-General of the United States (1) that this clause applied "only to actual additional immigration, namely, the coming of Chinese into the islands for the first time after annexation, and not to the return thither of Chinese who have lawful residence there and are simply exercising the recognized right of returning to their business and their homes after a temporary absence," and (2) "that Chinese women and children presenting permits issued under the laws of Hawaii prior to the receipt by the Hawaiian Government of the Treasury regulations transmitted to it through the special agent of the United States on November 12 last, may be admitted to those islands by virtue of such permits, and that other Chinese permits of the Hawaiian Government, issued in the same manner prior to the receipt by that Government of the regulations just mentioned, entitling them to sojourn for a temporary period in the islands, should also be admitted thereto."

Mr. Hay, Sec. of State, to Mr. Wu, Chinese min., March 11, 1899, For. Rel. 1899, 207. See also Mr. Wu to Mr. Hay, Dec. 12, 1898; Mr. Hay to Mr. Wu, Jan. 13, 1899; Mr. Wu to Mr. Hay, Feb. 18, 1899; Mr. Hay to Mr. Wu, Feb. 24 and March 1, 1899—For. Rel. 1899, 202-206.

See opinion of Mr. Richards Solicitor-General, Feb. 21, 1899, 22 Op. 353.

"Sec. 101. That Chinese in the Hawaiian Islands when this act takes effect may within one year thereafter obtain certificates of residence as required by 'An act to prohibit the coming of Chinese persons into the United States,' approved May 5, 1892, as amended by an act approved November 3, 1893, entitled 'An act to amend an act entitled "An act to prohibit



the coming of Chinese persons into the United States," approved May 5, 1892,' and until the expiration of said year shall not be deemed to be unlawfully in the United States if found therein without such certificates: *Provided, however,* That no Chinese laborer, whether he shall hold such certificate or not, shall be allowed to enter any State, Territory, or District of the United States from the Hawaiian Islands." (Act of April 30, 1900, entitled "An act to provide a government for the Territory of Hawaii." This act went into effect June 14, 1900.)

"Referring to instruction No. 86, of October 2 last, enclosing an opinion of the Attorney-General, rendered September 20 last, to the effect that claims existing against Hawaii

Claims.

in favor of the subjects or citizens of foreign governments prior to and at the time of its annexation to the United States should be referred to the Hawaiian Government for consideration, determination, and payment, I enclose herewith for delivery by you to the Hawaiian Government the additional papers listed below relating to the British claims, and a copy of a note from the Portuguese minister at this capital in relation to the claim of Manuel Gil dos Reis.

"In view of the opinion of the Attorney-General, this Department has not, of course, considered or passed upon the validity of any of the claims against Hawaii presented by foreign governments in behalf of their subjects.

"The Danish minister here has this day been informed that the claim of Edmund Norrie will also be considered and determined by the Hawaiian Government."

Mr. Hay, Sec. of State, to Mr. Sewall, agent at Honolulu, January 4, 1900, MS. Inst. Hawaii, III. 488.

See Mr. Hay, Sec. of State, to Lord Pauncefote, Brit. amb., Jan. 4, 1900, MS. Notes to Brit. Leg. XXV. 45; Mr. Hill, Act. Sec. of State, to the governor of Hawaii, Jan. 9, 1901, 250 MS. Dom. Let. 139, enclosing translation of a note of Jan. 2, 1901, from the Danish minister at Washington, relating to the claim of Edmund Norrie.

The United States decided that the claims of its citizens, growing out of their arrest in Hawaii in connection with the revolt of January, 1895, were invalid, there being no evidence that there was any maltreatment of the claimants during their imprisonment, nor that their arrest was due to any cause other than the desire of the Government to make a thorough investigation, which resulted in showing that, although they were not in fact implicated, they were not imprisoned "without some ground of suspicion." The United States had therefore decided that their alleged illegal treatment "was justified by the circumstances, which were unusual." (Mr. Hill, Act. Sec. of State, to Viscount de Santo-Thyrso, Feb. 15, 1901, MS. Notes to Portuguese Leg. VII. 280.)

"Much interesting information is given in the report of the governor of Hawaii as to the progress and development of the islands during the period from July 7, 1898, the date of the approval of the joint resolution of the Congress providing for their annexation, up to April 30, 1900, the date

President's message, 1900.

gress providing for their annexation, up to April 30, 1900, the date

of the approval of the act providing a government for the Territory, and thereafter.

"The last Hawaiian census, taken in the year 1896, gives a total population of 109,020, of which 31,019 were native Hawaiians. The number of Americans reported was 8,485. The results of the Federal census, taken this year, show the islands to have a total population of 154,001, showing an increase over that reported in 1896 of 44,981, or 41.2 per cent.

"There has been marked progress in the educational, agricultural, and railroad development of the islands."

President McKinley, annual message, Dec. 3, 1900.

See H. Report 305, 56 Cong. 1 sess.

#### 10. SPANISH WEST INDIES (EXCEPT CUBA), PHILIPPINES, AND GUAM.

### § 109.

"Mr. PRESIDENT: Since three months the American people and the ~~Message of Queen~~ Spanish nation are at war, because Spain did not con-  
Regent, July 22, sent to grant independence to Cuba and to withdraw  
1898. her troops therefrom.

"Spain faced with resignation such uneven strife and only endeavored to defend her possessions with no other hope than to oppose, in the measure of her strength, the undertaking of the United States and to protect her honor.

"Neither the trials which adversity has made us endure nor the realization that but faint hope is left us could deter us from struggling till the exhaustion of our very last resources. This stout purpose, however, does not blind us, and we are fully aware of the responsibilities which would weigh upon both nations in the eyes of the civilized world were this war to be continued.

"This war not only inflicts upon the two peoples who wage it the hardships inseparable from all armed conflict, but also dooms to useless suffering and unjust sacrifices the inhabitants of a territory to which Spain is bound by secular ties that can be forgotten by no nation either of the old or of the new world.

"To end calamities already so great, and to avert evils still greater, our countries might mutually endeavor to find upon which conditions the present struggle could be terminated otherwise than by force of arms.

"Spain believes this understanding possible and hopes that this view is also harbored by the Government of the United States. All true friends of both nations share no doubt the same hope.

"Spain wishes to show again that in this war, as well as in the one she carried on against the Cuban insurgents, she had but one object—the vindication of her prestige, her honor, her name. During the

war of insurrection it was her desire to spare the great island from the dangers of premature independence. In the present war she has been actuated by sentiments inspired rather by ties of blood than by her interests, and by the right belonging to her as mother country.

"Spain is prepared to spare Cuba from the continuation of the horrors of war if the United States are on their part likewise disposed.

"The President of the United States and the American people may now learn from this message the true thought, desire, and intention of the Spanish nation.

"And so do we wish to learn from the President of the United States upon which basis might be established a political status in Cuba, and might be terminated a strife which would continue without reason should both Governments agree upon the means of pacifying the island.

"In the name of the Government of Her Majesty the Queen Regent I have the honor to address this message to your Excellency with the expression of my highest consideration."

Message of the Government of Her Majesty the Queen Regent of Spain, to the President of the United States, dated at Madrid, July 22, 1898; signed by the Duke of Almodovar del Rio, Minister of State; submitted by Mr. J. Cambon, French ambassador at Washington, to President McKinley. (For. Rel. 1898, 819.)

"EXCELLENCY: The President received on the afternoon of Tuesday, the 26th instant, from the hand of his excellency the  
**President's reply,**  
**July 30, 1898.** ambassador of France, representing for this purpose the Government of Spain, the message signed by your excellency as minister of state in behalf of the Government of Her Majesty the Queen Regent of Spain, and dated the 22d instant, as to the possibility of terminating the war now existing between the United States and Spain.

"The President received with satisfaction the suggestion that the two countries might mutually endeavor to ascertain the conditions on which the pending struggle may be brought to an end, as well as the expression of Spain's belief that an understanding on the subject is possible.

"During the protracted negotiations that preceded the outbreak of hostilities, the President earnestly labored to avert a conflict, in the hope that Spain, in consideration of her own interests as well as those of the Spanish Antilles and the United States, would find a way for removing the conditions which had for half a century constantly disturbed the peace of the Western Hemisphere and on numerous occasions brought the two nations to the verge of war.

"The President witnessed with profound disappointment the frustration of his peaceful efforts by events which forced upon the people of the United States the unalterable conviction that nothing short of

relinquishment by Spain of a claim of sovereignty over Cuba which she was unable to enforce, would relieve a situation that had become unendurable.

“For years the Government of the United States, out of regard for the susceptibilities of Spain, had by the exercise of its power and the expenditure of its treasure preserved the obligations of neutrality. But a point was at length reached at which, as Spain had often been forewarned, this attitude could no longer be maintained. The spectacle at our very doors of a fertile territory wasted by fire and sword and given over to desolation and famine, was one to which our people could not be indifferent. Yielding therefore to the demands of humanity, they determined to remove the causes, in the effects of which they had become so deeply involved.

“To this end the President, with the authority of Congress, presented to Spain a demand for the withdrawal of her land and naval forces from Cuba, in order that the people of the island might be enabled to form a government of their own. To this demand Spain replied by severing diplomatic relations with the United States, and by declaring that she considered the action of this Government as creating a state of war between the two countries.

“The President could not but feel sincere regret that the local question as to the peace and good government of Cuba should thus have been transformed and enlarged into a general conflict of arms between two great peoples. Nevertheless, having accepted the issue with all the hazards which it involves, he has, in the exercise of his duty, and of the rights which the state of war confers, prosecuted hostilities by land and sea, in order to secure at the earliest possible moment an honorable peace. In so doing he has been compelled to avail himself unsparingly of the lives and fortunes which his countrymen have placed at his command, and untold burdens and sacrifices, far transcending any material estimation, have been imposed upon them.

“That, as the result of the patriotic exertions of the people of the United States, the strife has, as your excellency observes, proved unequal, inclines the President to offer a brave adversary generous terms of peace.

“The President, therefore, responding to your excellency’s request, will state the terms of peace which will be accepted by him at the present time, subject to the approval of the Senate of the United States hereafter.

“Your excellency in discussing the question of Cuba, intimates that Spain has desired to spare the island the dangers of premature independence. The Government of the United States has not shared the apprehensions of Spain in this regard, but it recognizes the fact that in the distracted and prostrate condition of the island, aid and guidance will be necessary, and these it is prepared to give.

"The United States will require:

"First. The relinquishment by Spain of all claim of sovereignty over or title to Cuba, and her immediate evacuation of the island.

"Second. The President, desirous of exhibiting signal generosity will not now put forth any demand for pecuniary indemnity. Nevertheless, he can not be insensible to the losses and expenses of the United States incident to the war, or to the claims of our citizens for injuries to their persons and property during the late insurrection in Cuba. He must therefore require the cession to the United States, and the evacuation by Spain of the islands of Porto Rico and other islands now under the sovereignty of Spain in the West Indies, and also the cession of an island in the Ladrões to be selected by the United States.

"Third. On similar grounds the United States is entitled to occupy, and will hold the city, bay, and harbor of Manila pending the conclusion of a treaty of peace which shall determine the control, disposition, and government of the Philippines.

"If the terms hereby offered are accepted in their entirety, commissioners will be named by the United States to meet similarly authorized commissioners on the part of Spain for the purpose of settling the details of the treaty of peace, and signing and delivering it under the terms above indicated."

Mr. Day, Sec. of State, to the Duke of Almodovar del Rio, Spanish Minister of State, July 30, 1898, For. Rel. 1898, 820.

"MR. SECRETARY OF STATE: The French ambassador at Washington, whose good offices have enabled the Spanish Govern-

Spanish note of  
Aug. 7, 1898.

ment to address a message to the President of the United States, has forwarded by cable your excellency's

reply to this document.

"In examining the arguments used as a preamble to the specification of the terms upon which peace may be restored between Spain and the United States, it behooves the Spanish Government to deduct from the order of events that the severance of diplomatic relations with the United States had no other purpose than to decline the acceptance of an ultimatum which Spain could only consider as an attempt against her rightful sovereignty over Cuba.

"Spain did not declare war; she met it because it was the only means of defending her rights in the Greater Antilles. Thus did the Queen and the United States see fit to transform and enlarge the purely local question of Cuba.

"From this fact your excellency draws the conclusion that the question at stake is no longer only the one which relates to the territory of Cuba, but also that the losses of American lives and fortunes incident to the war should in some manner be compensated.

"As to the first condition, relating to the future of Cuba, the two Governments reach similar conclusions in regard to the natural inability of its people to establish an independent government. Be it by reason of inadequate development, as we believe, or on account of the present distracted and prostrate condition of the island, as your excellency states, the fact remains that Cuba needs guidance. The American people are willing to assume the responsibility of giving this guidance by substituting themselves to the Spanish nation, whose right to keep the island is indisputable; to this intimation we have nothing to oppose. The necessity of withdrawing from the territory of Cuba being imperative, the nation assuming Spain's place must, as long as this territory shall not have fully reached the conditions required to take rank among other sovereign powers, provide for rules which will insure order and protect against all risks the Spanish residents, as well as the Cuban natives still loyal to the mother country.

"In the name of the nation the Spanish Government hereby relinquishes all claim of sovereignty over or title to Cuba, and engages to the irremediable evacuation of the island, subject to the approval of the Cortes—a reserve which we likewise make with regard to the other proffered terms—just as these terms will have to be ultimately approved by the Senate of the United States.

"The United States require, as an indemnity for or an equivalent to the sacrifices they have borne during this short war, the cession of Porto Rico and of the other islands now under the sovereignty of Spain in the West Indies, and also the cession of an island in the Ladrões, to be selected by the Federal Government.

"This demand strips us of the very last memory of a glorious past, and expels us at once from the prosperous island of Porto Rico and from the Western Hemisphere, which became peopled and civilized through the proud deeds of our ancestors. It might, perhaps, have been possible to compensate by some other cession for the injuries sustained by the United States. However, the inflexibility of the demand obliges us to cede, and we shall cede, the island of Porto Rico and the other islands belonging to the Crown of Spain in the West Indies, together with one of the islands of the archipelago of the Ladrões, to be selected by the American Government.

"The terms relating to the Philippines seem, to our understanding, to be quite indefinite. On the one hand, the ground on which the United States believe themselves entitled to occupy the bay, the harbor, and the city of Manila, pending the conclusion of a treaty of peace, can not be that of conquest, since in spite of the blockade maintained on sea by the American fleet, in spite of the siege established on land by a native supported and provided for by the American admiral, Manila still holds its own, and the Spanish standard still waves over the city. On the other hand, the whole archipelago of the Philippines is in the power

and under the sovereignty of Spain. Therefore the Government of Spain thinks that the temporary occupation of Manila should constitute a guaranty. It is stated that the treaty of peace shall determine the control, disposition, and government of the Philippines; but as the intentions of the Federal Government by regression remain veiled, therefore the Spanish Government must declare that, while accepting the third condition, they do not *a priori* renounce the sovereignty of Spain over the archipelago, leaving it to the negotiators to agree as to such reforms which the condition of these possessions and the level of culture of their natives may render desirable.

"The Government of Her Majesty accepts the third condition, with the above-mentioned declarations.

"Such are the statements and observations which the Spanish Government has the honor to submit in reply to your excellency's communication. They accept the proffered terms, subject to the approval of the Cortes of the Kingdom, as required by their constitutional duties.

"The agreement between the two Governments implies the irre-mearable suspension of hostilities and the designation of commissioners for the purpose of settling the details of the treaty of peace and of signing it, under the terms above indicated."

Message of the Duke of Almodovar del Rio, Spanish Minister of State, to Mr. Day, Sec. of State, dated Madrid, Aug. 7, 1898, and presented to Mr. Day by Mr. Cambon, French ambassador, Aug. 9, 1898. (For. Rel. 1898, 822.)

"Although it is your understanding that the note of the Duke of Almodovar, which you left with the President on yesterday afternoon, is intended to convey an acceptance by the Spanish Government of the terms set forth in my note of the 30th ultimo as the basis on which the President would appoint commissioners to negotiate and conclude with commissioners on the part of Spain a treaty of peace, I understand that we concur in the opinion that the Duke's note, doubtless owing to the various transformations which it has undergone in the course of its circuitous transmission by telegraph and in cipher, is not, in the form in which it has reached the hands of the President, entirely explicit.

"Under these circumstances it is thought that the most direct and certain way of avoiding misunderstanding is to embody in a protocol, to be signed by us as the representatives, respectively, of the United States and Spain, the terms on which the negotiations for peace are to be undertaken.

"I therefore inclose herewith a draft of such a protocol, in which you will find that I have embodied the precise terms tendered to Spain in my note of the 30th ultimo, together with appropriate stipulations for the appointment of commissioners to arrange the details of the immediate evacuation of Cuba, Porto Rico, and other islands under

Spanish sovereignty in the West Indies, as well as for the appointment of commissioners to treat of peace."

Mr. Day, Sec. of State, to Mr. Cambon, French ambassador, Aug. 10, 1898, For. Rel. 1898, 823.

Aug. 12, 1898, Mr. Day, Secretary of State, and Mr. Cambon, French ambassador, signed, as the result of the foregoing correspondence, the following protocol, in English and in French:

William R. Day, Secretary of State of the United States, and His Excellency Jules Cambon, Ambassador Extraordinary and Plenipotentiary of the Republic of France at Washington, respectively possessing for this purpose full authority from the Government of the United States and the Government of Spain, have concluded and signed the following articles, embodying the terms on which the two Governments have agreed in respect to the matters hereinafter set forth, having in view the establishment of peace between the two countries, that is to say:

ARTICLE I. Spain will relinquish all claim of sovereignty over and title to Cuba.

ARTICLE II. Spain will cede to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and also an island in the Ladrões to be selected by the United States.

ARTICLE III. The United States will occupy and hold the city, bay and harbor of Manila, pending the conclusion of a treaty of peace which shall determine the control, disposition and government of the Philippines.

ARTICLE IV. Spain will immediately evacuate Cuba, Porto Rico and other islands now under Spanish sovereignty in the West Indies; and to this end each Government will, within ten days after the signing of this protocol, appoint Commissioners, and the Commissioners so appointed shall, within thirty days after the signing of this protocol, meet at Havana for the purpose of arranging and carrying out the details of the aforesaid evacuation of Cuba and the adjacent Spanish

William R. Day, Secrétaire d'Etat des Etats-Unis, et Son Excellence M. Jules Cambon, Ambassadeur Extraordinaire et Plénipotentiaire de la République Française à Washington, ayant respectivement reçu à cet effet pleine autorisation du Gouvernement des Etats-Unis et du Gouvernement d'Espagne, ont conclu et signé les articles suivants qui précisent les termes sur lesquels les deux Gouvernements se sont mis d'accord en ce qui concerne les questions ci-après désignées et ayant pour objet l'établissement de la paix entre les deux pays, savior:

ARTICLE I. L'Espagne renoncera à toute prétention à sa souveraineté et à tout droit sur Cuba.

ARTICLE II. L'Espagne cédera aux Etats-Unis l'île de Porto-Rico et les autres îles actuellement sous la souveraineté Espagnole dans les Indes Occidentales, ainsi qu'une île dans les Ladrões qui sera choisie par les Etats-Unis.

ARTICLE III. Les Etats-Unis occuperont et tiendront la ville, la baie et le port de Manille en attendant la conclusion d'un traité de paix qui devra déterminer le contrôle, la disposition et le gouvernement des Philippines.

ARTICLE IV. L'Espagne évacuera immédiatement Cuba, Porto Rico et les autres îles actuellement sous la souveraineté Espagnole dans les Indes Occidentales; à cet effet chacun des deux Gouvernements nommera, dans les dix jours qui suivront la signature de ce protocole, des commissaires, et les commissaires ainsi nommés devront, dans les trente jours qui suivront la signature de ce protocole, se rencontrer à la Havane afin d'arranger et d'exécuter les détails de l'évacuation



islands; and each Government will, within ten days after the signing of this protocol, also appoint other Commissioners, who shall, within thirty days after the signing of this protocol, meet at San Juan, in Porto Rico, for the purpose of arranging and carrying out the details of the aforesaid evacuation of Porto Rico and other islands now under Spanish sovereignty in the West Indies.

ARTICLE V. The United States and Spain will each appoint not more than five commissioners to treat of peace, and the commissioners so appointed shall meet at Paris not later than October 1, 1898, and proceed to the negotiation and conclusion of a treaty of peace, which treaty shall be subject to ratification according to the respective constitutional forms of the two countries.

ARTICLE VI. Upon the conclusion and signing of this protocol, hostilities between the two countries shall be suspended, and notice to that effect shall be given as soon as possible by each Government to the commanders of its military and naval forces.

Done at Washington in duplicate, in English and in French, by the Undersigned, who have hereunto set their hands and seals, the 12th day of August 1898.

sus-mentionnée de Cuba et des îles Espagnoles adjacentes; et chacun des deux Gouvernements nommera également, dans les dix jours qui suivront la signature de ce protocole, d'autres commissaires qui devront, dans les trente jours de la signature de ce protocole, se rencontrer à San Juan de Porto-Rico afin d'arranger et d'exécuter les détails de l'évacuation sus-mentionnée de Porto-Rico et des autres îles actuellement sous la souveraineté Espagnole dans les Indes Occidentales.

ARTICLE V. Les Etats-Unis et l'Espagne nommeront, pour traiter de la paix, cinq commissaires au plus pour chaque pays; les commissaires ainsi nommés devront se rencontrer à Paris, le 1<sup>er</sup> Octobre 1898, au plus tard, et procéder à la négociation et à la conclusion d'un traité de paix; ce traité sera sujet à ratification, selon les formes constitutionnelles de chacun des deux pays.

ARTICLE VI. A la conclusion et à la signature de ce protocole, les hostilités entre les deux pays devront être suspendues, et des ordres à cet effet devront être donnés aussitôt que possible par chacun des deux Gouvernements aux commandants de ses forces de terre et de mer.

Fait à Washington, en double exemplaire, anglais et français, par les Soussignés qui y ont apposé leur signature et leur sceau, le 12 Août 1898.

"This Government has selected the island of Guam [in the Ladrões], and you are instructed to embody in the treaty of Instructions of Sept. 16, 1898. peace a proper stipulation of cession. . . .

"Without any original thought of complete or even partial acquisition, the presence and success of our arms at Manila imposes upon us obligations which we can not disregard. The march of events rules and overrules human action. Avowing unreservedly the purpose which has animated all our effort, and still solicitous to adhere to it, we can not be unmindful that without any desire or design on our part the war has brought us new duties and responsibilities which we must meet and discharge as becomes a great nation on whose growth and career from the beginning the Ruler of Nations has plainly written the high command and pledge of civilization.

"Incidental to our tenure of the Philippines is the commercial opportunity to which American statesmanship can not be indifferent.

It is just to use every legitimate means for the enlargement of American trade; but we seek no advantages in the Orient which are not common to all. Asking only the open door for ourselves, we are ready to accord the open door to others. The commercial opportunity which is naturally and inevitably associated with this new opening depends less on large territorial possessions than upon an adequate commercial basis and upon broad and equal privileges.

"It is believed that in the practical application of these guiding principles the present interests of our country and the proper measure of its duty, its welfare in the future, and the consideration of its exemption from unknown perils will be found in full accord with the just, moral, and humane purpose which was invoked as our justification in accepting the war.

"In view of what has been stated, the United States can not accept less than the cession in full right and sovereignty of the island of Luzon. It is desirable, however, that the United States shall acquire the right of entry for vessels and merchandise belonging to citizens of the United States into such ports of the Philippines as are not ceded to the United States upon terms of equal favor with Spanish ships and merchandise, both in relation to port and customs charges and rates of trade and commerce, together with other rights of protection and trade accorded to citizens of one country within the territory of another. You are therefore instructed to demand such concession, agreeing on your part that Spain shall have similar rights as to her subjects and vessels in the ports of any territory in the Philippines ceded to the United States.

Instructions of President McKinley to the United States Peace Commissioners, Sept. 16, 1898, S. Doc. 148, 56 Cong. 2 sess. 5, 7.

For reports of the Peace Commissioners in relation to the Philippines, see S. Doc. 148, 56 Cong. 2 sess. 18, 24, 32, 42, 43, 44, 45, 51, 54, 58.

"The information which has come to the President since your departure convinces him that the acceptance of the cession of Luzon alone, leaving the rest of the islands subject to Spanish rule, or to be the subject of future contention, can not be justified on political, commercial, or humanitarian grounds. The cession must be of the whole archipelago or none. The latter is wholly inadmissible and the former must therefore be required. The President reaches this conclusion after most thorough consideration of the whole subject, and is deeply sensible of the grave responsibilities it will impose, believing that this course will entail less trouble than any other and besides will best subserve the interests of the people involved, for whose welfare we can not escape responsibility.

Decision as to the  
Philippines.

Mr. Hay, Sec. of State, to Mr. Day, president of the United States Peace Commission, tel., Oct. 26, 1898, S. Doc. 148, 56 Cong. 2 sess. 35.

The views expressed in the foregoing telegram are amplified in Mr. Hay, Sec. of State, to Mr. Day, president of United States Peace Commission, tel. Oct. 28, 1898, S. Doc. 148, 56 Cong. 2 sess. 37.

“A treaty of peace is of the highest importance to the United States if it can be had without the sacrifice of plain duty. The President would regret deeply the resumption of hostilities against a prostrate foe. We are clearly entitled to indemnity for the cost of the war. We can not hope to be fully indemnified. We do not expect to be. It would probably be difficult for Spain to pay money. All she has are the archipelagoes of the Philippines and the Carolines. She surely can not expect us to turn the Philippines back and bear the cost of the war and all claims of our citizens for damages to life and property in Cuba without any indemnity but Porto Rico, which we have and which is wholly inadequate. Does Spain propose to pay in money the cost of the war and the claims of our citizens, and make full guaranties to the people of the Philippines, and grant to us concessions of naval and telegraph stations in the islands, and privileges to our commerce the same as enjoyed by herself rather than surrender the archipelago? From the standpoint of indemnity both the archipelagoes are insufficient to pay our war expenses, but aside from this do we not owe an obligation to the people of the Philippines which will not permit us to return them to the sovereignty of Spain? Could we justify ourselves in such a course, or could we permit their barter to some other power? Willing or not, we have the responsibility of duty which we can not escape.

“You are therefore instructed to insist upon the cession of the whole of Philippines, and, if necessary, pay to Spain ten to twenty millions of dollars, and if you can get cession of a naval and telegraph station in the Carolines, and the several concessions and privileges and guaranties, so far as applicable, enumerated in the views of Commissioners Frye and Reid, you can offer more. The President can not believe any division of the archipelago can bring us anything but embarrassment in the future. The trade and commercial side, as well as the indemnity of the cost of the war, are questions we might yield. They might be waived or compromised, but the questions of duty and humanity appeal to the President so strongly that he can find no appropriate answer but the one he has here marked out. You have the largest liberty to lead up to these instructions, but unreasonable delay should be avoided.”

Mr. Hay, Sec. of State, to Mr. Day, president of the United States Peace Commission, tel., Nov. 13, 1898, S. Doc. 148, 56 Cong. 2 sess. 48. See also *id.*, p. 60.

Nov. 21, 1898, the American commissioners presented an ultimatum, in which they demanded the cession of the entire archipelago of the Philippines, while on the other hand they offered to pay Spain \$20,000,000, to admit Spanish ships and merchandise into the ports of the islands for a stated period on the same terms as American ships

and merchandise, and to insert in the treaty of peace a mutual relinquishment of claims.

S. Doc. 62, 55 Cong. 3 sess., part 2, p. 210.

By the treaty of peace signed Dec. 10, 1898, Spain relinquished (Art. I.) "all claims of sovereignty over and title to Cuba," and ceded to the United States (Art. II.) "the island of Porto Rico<sup>a</sup> and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrões." She also ceded (Art. III.) "the archipelago known as the Philippine Islands, and comprehending the islands lying within the following line: A line running from west to east along or near the twentieth parallel of north latitude, and through the middle of the navigable channel of Bachi, from the one hundred and eighteenth (118th) to the one hundred and twenty-seventh (127th) degree meridian of longitude east of Greenwich, thence along the one hundred and twenty-seventh (127th) degree meridian of longitude east of Greenwich to the parallel of four degrees and forty-five minutes (4° 45') north latitude, thence along the parallel of four degrees and forty-five minutes (4° 45') north latitude to its intersection with the meridian of longitude one hundred and nineteen degrees and thirty-five minutes (119° 35') east of Greenwich, thence along the meridian of longitude one hundred and nineteen degrees and thirty-five minutes (119° 35') east of Greenwich to the parallel of latitude seven degrees and forty minutes (7° 40') north, thence along the parallel of latitude seven degrees and forty minutes (7° 40') north to its intersection with the one hundred and sixteenth (116th) degree meridian of longitude east of Greenwich, thence by a direct line to the intersection of the tenth (10th) degree parallel of north latitude with the one hundred and eighteenth (118th) degree meridian of longitude east of Greenwich, and thence along the one hundred and eighteenth (118th) degree meridian of longitude east of Greenwich to the point of beginning."<sup>b</sup>

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<sup>a</sup> The evacuation of Porto Rico was accomplished Oct. 18, 1898. (President McKinley, third annual message, Dec. 5, 1899.)

Acts for the civil government of the island were approved April 12 and May 1, 1900. The act of April 12, 1900, provided for the establishment of quarantine stations. For hearings on legislation for the island, see S. Doc. 147, 56 Cong. 1 sess. By the act of April 12, 1900, the coasting-trade laws were made applicable to trade and navigation between the United States and Porto Rico.

<sup>b</sup> "By the terms of the Treaty of Peace the line bounding the ceded Philippine group in the southwest failed to include several small islands lying westward of the Sulús, which have always been recognized as under Spanish control. The occupation of Sibutú and Cagayan Sulú by our naval forces elicited a claim on the part of Spain, the essential equity of which could not be gainsaid. In order to cure the defect of the treaty by removing all possible ground of future misunderstanding respecting the interpretation of its third article, I directed the negotiation of a supplementary treaty, which will be forthwith laid before the Senate, whereby Spain

By the same Article (III.) the United States agreed to pay to Spain, within three months after the exchange of the ratifications of the treaty, the sum of \$20,000,000.

“On the 10th of December, 1898, the treaty of peace between the United States and Spain was signed. It provided, among other things, that Spain should cede to the United States the archipelago known as the Philippine Islands, that the United States should pay to Spain the sum of twenty millions of dollars, and that the civil rights and political status of the native inhabitants of the territories thus ceded to the United States should be determined by the Congress. The treaty was ratified by the Senate on the 6th of February, 1899, and by the Government of Spain on the 19th of March following. The ratifications were exchanged on the 11th of April and the treaty publicly proclaimed. On the 2d of March the Congress voted the sum contemplated by the treaty, and the amount was paid over to the Spanish Government on the 1st of May.

“In this manner the Philippines came to the United States. The islands were ceded by the Government of Spain, which had been in undisputed possession of them for centuries. They were accepted not merely by our authorized commissioners in Paris, under the direction of the Executive, but by the constitutional and well-considered action of the representatives of the people of the United States in both Houses of Congress. I had every reason to believe, and I still believe, that this transfer of sovereignty was in accordance with the wishes and the aspirations of the great mass of the Filipino people. . . .

“The authorities of the Sulu Islands have accepted the succession of the United States to the rights of Spain, and our flag floats over that territory. On the 10th of August, 1899, Brig. Gen. J. C. Bates, United States Volunteers, negotiated an agreement with the Sultan and his principal chiefs, which I transmit herewith. By Article I. the sovereignty of the United States over the whole archipelago of Jolo and its dependencies is declared and acknowledged.

“The United States flag will be used in the archipelago and its dependencies, on land and sea. Piracy is to be suppressed, and the Sultan agrees to cooperate heartily with the United States authorities to that end and to make every possible effort to arrest and bring to justice all persons engaged in piracy. All trade in domestic products

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quits all title and claim of title to the islands named as well as to any and all islands belonging to the Philippine Archipelago lying outside the lines described in said third article, and agrees that all such islands shall be comprehended in the cession of the archipelago as fully as if they had been expressly included within those lines. In consideration of this cession the United States is to pay to Spain the sum of \$100,000.” (President McKinley, Ann. Msg., Dec. 3, 1900.)

The supplementary treaty was signed Nov. 7, 1900; the ratifications were exchanged March 23, 1901.

of the archipelago of Jolo when carried on with any part of the Philippine Islands and under the American flag shall be free, unlimited, and undutiable. The United States will give full protection to the Sultan in case any foreign nation should attempt to impose upon him. The United States will not sell the island of Jolo or any other island of the Jolo archipelago to any foreign nation without the consent of the Sultan. Salaries for the Sultan and his associates in the administration of the islands have been agreed upon to the amount of \$760 monthly.

"Article X. provides that any slave in the archipelago of Jolo shall have the right to purchase freedom by paying to the master the usual market value. The agreement by General Bates was made subject to confirmation by the President and to future modifications by the consent of the parties in interest. I have confirmed said agreement, subject to the action of the Congress, and with the reservation, which I have directed shall be communicated to the Sultan of Jolo, that this agreement is not to be deemed in any way to authorize or give the consent of the United States to the existence of slavery in the Sulu archipelago. I communicate these facts to the Congress for its information and action."

President McKinley, third annual message, Dec. 5, 1899.

An act "temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes," was approved by the President July 1, 1902.

See, also, the act of March 8, 1902, "temporarily to provide revenue" for the islands.

For communications between the Executive Departments of the Government and Aguinaldo, see S. Doc. 208, 56 Cong. 1 sess., parts 1, 2, and 3.

For information and statistics concerning the Philippines, see S. Doc. 171, 56 Cong. 1 sess.

As to the status of Chinese persons in the islands, see S. Doc. 397, 56 Cong. 1 sess.

By a treaty concluded Feb. 12, 1899, and ratified by the Cortes and Reichstag in the following June, Germany acquired from Spain, for 25,000,000 pesetas, or \$4,825,000, the Caroline Islands, and all that remained of the Marianas or Ladrões. (Ann. Reg. 1899, [334], 31; the International Year Book, 1899, 166; Polit. Science Quarterly, XIV, 754.)

In a note of July 31, 1900, the German embassy at Washington took the ground, in connection with restrictions of trade imposed by the military authorities of the islands of the Sulu Archipelago, that under the protocols of 1877 and 1885 between Germany, Great Britain and Spain the sovereignty of Spain over the archipelago was subjected to a certain limitation which had not been removed by the transfer of the sovereignty by Spain to the United States. The United States, however, asserts over the archipelago a sovereignty that is complete and exclusive.

Mr. Magoon, law officer, division of insular affairs, War Department, Oct. 8, 1900, Magoon's Reps. 316.

July 7, 1899, the Belgian legation at Washington asked that the American military authorities in the Philippines be instructed to permit a Belgian firm having an establishment at Manila to charter one or more neutral vessels "to carry on the coasting trade on the coasts of the islands during the continuance of hostilities." The United States replied that it was not deemed advisable by the War Department to grant permission at that time "to foreign vessels to engage in the coasting trade in the Philippine Islands."<sup>a</sup>

By the act of March 8, 1902, it was enacted that till July 1, 1904, "the provisions of law restricting to vessels of the United States the transportation of passengers and merchandise directly or indirectly from one port of the United States to another port of the United States shall not be applicable to foreign vessels engaging in trade between the Philippine Archipelago and the United States, or between ports in the Philippine Archipelago."

October 23, 1902, President Roosevelt issued an order declaring that the Executive order of July 3, 1899, prescribing the conditions on which customs officers in the Philippines might issue certificates entitling vessels to the protection and flag of the United States on the high seas and in all ports should not be deemed to preclude the Philippine Commission from enacting laws "extending the right or privilege of interisland or coastwise trade in the Philippine Archipelago to foreign vessels during the period while the laws regulating the coastwise trade of the United States are inapplicable thereto under the provisions of the act of Congress . . . approved March 8, 1902."

"Having referred to this subject, he [the Sultan of Turkey] said immediately following my audience with him . . . he telegraphed to Mecca, it being the time of the annual pilgrimage, his wishes that the Moslems in the Philippines should not war with the Americans, nor side with the insurgents, but should be friendly with our army, and that, as I assured him (the Sultan), the Americans would not interfere with their religion and would be as tolerant toward them as he was toward the Christians in his Empire. He added there was at Mecca at the time he sent that message quite a number of pilgrims from the Pacific Islands, and especially their most prominent general and several other officers, and shortly thereafter they returned to their homes. That he was glad that there had been no conflict between our army and the Moslems, and that he certainly hoped their religion would in no manner be interfered with.

"I replied, of this he could certainly feel satisfied, that religious liberty was the chief corner stone of our political institutions. He added he hoped his friendly spirit toward my country would be understood."

Mr. Straus, min. to Turkey, to Mr. Hay, Sec. of State, Sept. 23, 1899, For. Rel. 1899, 768, 770.

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<sup>a</sup>Mr. Hay, Sec. of State, to Count de Lichtervelde, Belgian min., July 31, 1898, For. Rel. 1899, 102.

Article I. of the treaty of peace with Spain contained the following provision: "And as the island [Cuba] is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property."

Referring to the occupation of Cuba by the United States, the British ambassador, in February, 1899, expressed the hope that he might receive an assurance that the rights of certain cable companies under concessions granted by Spain would be "duly assumed and carried out by the United States Government" during its occupation of the territory.<sup>a</sup>

The Department of State replied that the Attorney-General held that the existing American control of Cuba was "essentially and merely that exercisable by a temporary military occupation," and that the United States, "not having established a protectorate over Cuba," was "not called upon to discuss the question of the transitory obligations which devolve upon a protecting state."<sup>b</sup>

The British Government, referring, in answer to this statement, to the provision in the treaty (Art. XVI.), by which the United States agreed, on the termination of its occupancy of Cuba, to "advise any government established in the island to assume the same obligations" as had been assumed by itself, said: "Such an occupation is not in the slightest degree analogous to a mere military occupation. It may or may not be temporary, but, so long as it lasts, it carries with it the duty of respecting such local obligations as the concessions of the telegraph company. It need not, in the opinion of Her Majesty's Government, be contended that the United States assumed absolute responsibility for the permanent observance of these concessions in Cuba, but they are bound to respect them during the occupation, and to 'advise' any succeeding Government to do the like. This obligation appears to Her Majesty's Government to result from the character of the occupation itself, and from the terms of the treaty."<sup>c</sup>

The Attorney-General, commenting upon this note, called attention to the fact that the opinion from which it dissented was given before the ratification of the treaty of peace, and that he had expressly referred to the United States being "still theoretically at war with Spain."

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<sup>a</sup>Sir J. Pauncefote, Brit. amb., to Mr. Hay, Sec. of State, Feb. 14, 1899, 130 MS. Notes from Brit. Leg.

<sup>b</sup>Mr. Hay, Sec. of State, to Sir J. Pauncefote, Brit. amb., Mar. 27, 1899, MS. Notes to Brit. Leg. XXIV. 482.

<sup>c</sup>Sir J. Pauncefote, Brit. amb., to Mr. Hay, Sec. of State, May 25, 1899, 131 MS. Notes from Brit. Leg.



"I agree," added the Attorney-General, "that our occupation of Cuba is now other than analogous to a military occupation of a foreign country in time of war. Since the exchange of ratifications of the peace treaty it has been an occupation of a foreign country in time of peace, and in no way affected, internationally speaking, by the circumstance that the Army has been used as the agency. (Calvo, sec. 3144.)

"I concede, the treaty having been duly ratified, that Great Britain has a right to appeal, on behalf of her subjects, to the rules prevailing in time of peace. But she has not necessarily the right to ignore the new facts which have followed the cessation of the sovereignty of Spain. Nor do I understand that the *chargé* questions our duty and right as asserted in the joint resolutions of April 20, 1898, now partly executed, . . . which contemplates an occupancy of Cuba until 'the pacification thereof,' and then the turning over of the island to the control and government of its people. In performance of this duty, we are accordingly occupying Cuba and preparing to turn over the control. This can not be done till the people have organized a government to receive it.

"These are facts which are to be reckoned with in ascertaining our obligations with regard to such debts as that government may take over from the former government of Cuba, as being the government of the same nation or people."<sup>a</sup>

"The facts above detailed make it clear that within the meaning of the act of June 6, 1900, Cuba is foreign territory. It cannot be regarded, in any constitutional, legal, or international sense, a part of the territory of the United States.

"While by the act of April 25, 1898, declaring war between this country and Spain, the President was directed and empowered to use our entire land and naval forces, as well as the militia of the several States, to such extent as was necessary to carry such act into effect, that authorization was not for the purpose of making Cuba an integral part of the United States, but only for the purpose of compelling the relinquishment by Spain of its authority and government in that island and the withdrawal of its forces from Cuba and Cuban waters. The legislative and executive branches of the Government, by the joint resolution of April 20, 1898, expressly disclaimed any purpose to exercise sovereignty, jurisdiction, or control over Cuba 'except for the pacification thereof,' and asserted the determination of the United States, that object being accomplished, to leave the government and control of Cuba to its own people. All that has been done in relation to Cuba has had that end in view and, so far as the court is informed by the public history of the relations of this country with that island, nothing has been done inconsistent with the declared object of the war with Spain.

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<sup>a</sup> Griggs, At.-Gen., Dec. 6, 1899, 22 Op. 654, 655-656.

"Cuba is none the less foreign territory, within the meaning of the act of Congress, because it is under a military governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations. The occupancy of the island by troops of the United States was the necessary result of the war. That result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the people of Cuba.

"It is true that as between Spain and the United States—indeed, as between the United States and all foreign nations—Cuba, upon the cessation of hostilities with Spain and after the Treaty of Paris, was to be treated as if it were conquered territory. But as between the United States and Cuba that island is territory held in trust for the inhabitants of Cuba, to whom it rightfully belongs and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action."

Neely v. Henkel (1900), 180 U. S. 109, 119-120.

The President is authorized to do whatever he finds necessary or expedient for the proper administration of government in Cuba, having in view the pacification of the island and the establishment of order and industry.

For the purpose of disbanding the insurgent forces in Cuba, the President is authorized to pay some or all of the soldiers of such forces either out of the revenues of the island or out of the emergency fund provided by the act of January 5, 1899. (Griggs, Atty.-Gen., Jan. 14, 1899, 22 Op. 301.)

By the proviso relating to the American evacuation of Cuba, inserted in the act of March 2, 1901, and commonly known as the Platt amendment, it is declared that "the Isle of Pines shall be omitted from the proposed constitutional boundary of Cuba, the title thereto being left to future adjustment by treaty."<sup>a</sup> The provisions of this amendment were accepted by the constitutional convention of Cuba.

Isle of Pines, and  
other conditions  
of evacuation.

#### 11. TUTUILA AND OTHER SAMOAN ISLANDS.

##### § 110.

As early as 1853, if not earlier, the United States was represented by a commercial agent at Apia, in the Samoan, then commonly called the Navigators, Islands, and in several subsequent appropriation acts provision was made for a consul there.<sup>b</sup>

<sup>a</sup> 31 Stat. 895, 897-898.

<sup>b</sup> In the Congressional Directory of June 20, 1854, 48, may be found the name of Aaron Van Camp as commercial agent at Apia. Information as to claims for spoliations by "wrongful acts of the commercial agent of the United States exercising authority" at Apia, in 1855, may be found in H. Report 212, 35 Cong. 2 sess.; H. Report 569, 36 Cong. 1 sess.; S. Report 148, 36 Cong. 1 sess. See, also, Mr. Marcy, Sec. of State, to Mr. Dobbin, Sec. of Navy, Jan. 13, 1857, 46 MS. Dom. Let. 244.

February 17, 1872, Commander Meade, of the U. S. S. *Narragansett*, entered into an agreement with Maunga, Great Chief of the Bay of Pagopago (pronounced Pangopango), in the island of Tutuila, whereby the chief, who professed a desire for the friendship and protection of the United States, granted to the Government the exclusive privilege of establishing in that harbor a naval station for the use and convenience of United States Government vessels.<sup>a</sup> May 22, 1872, President Grant communicated this agreement to the Senate, saying that he would not hesitate to recommend its approval but for the protection to which it pledged the United States, and that with some modification of the obligation he recommended it to the favorable consideration of the Senate.<sup>b</sup>

About the same time the attention of the United States "was directed, by highly respected commercial persons, to the importance of the growing trade and commerce of the United States with the islands in the South Pacific Ocean and to the opportunities of increasing our commercial relations in that quarter of the globe."<sup>c</sup> With a view to secure trustworthy information in regard to the Samoan Islands, a special agent named Steinberger was sent thither by the Department of State in 1873. He accomplished his mission, and his report was communicated by the President to Congress on April 21, 1874.<sup>d</sup> In December, 1874, he was sent back to the islands to convey to the chiefs a letter from the President and some presents. Not long afterwards rumors reached the United States that he had set up a government in the islands and was administering it; and it was said that he had assured the natives that the islands were under the protection of the United States. These reports led the House of Representatives, on March 28, 1876, to adopt a resolution instructing the Committee on Foreign Affairs to inquire into the extent and character of Steinberger's powers, and to call on the Secretary of State for correspondence relating to his mission. The investigation elicited the fact that his visits to the islands "were simply for the purpose of observation and report; that his mission had no diplomatic or political significance whatever, and that he had never been authorized to pledge the United States to the support of any government he might form or assist in forming."<sup>e</sup>

After making a second report, Steinberger resigned his position as special agent of the United States. As ruler of Samoa he fell into difficulties, and with the concurrence of the American consul, who was

<sup>a</sup> H. Ex. Doc. 161, 44 Cong. 1 sess. 6.

<sup>b</sup> H. Ex. Doc. 161, 41 Cong. 1 sess. 6.

<sup>c</sup> Report of Mr. Fish, Secretary of State, to the President, May 1, 1876, H. Ex. Doc. 161, 44 Cong. 1 sess.

<sup>d</sup> S. Ex. Doc. 45, 43 Cong. 1 sess.

<sup>e</sup> Report of Mr. Fish, May 1, 1876, H. Ex. Doc. 161, 44 Cong. 1 sess.

at open variance with him, he was deported on a British man-of-war. On March 18, 1876, the American consul at Apia transmitted to the Department of State a copy of a document said to have been found among Steinberger's papers after his arrest, and which purported to be an agreement between him and the house of Godeffroy & Son, of Hamburg, entered into before his return to Samoa, by which, for a certain commission, he undertook to exercise all his influence in Samoa in any position he might occupy for the furtherance of the German firm's trade.<sup>a</sup>

In 1877 a native of rank, named Mamea, was sent by the chiefs of Samoa to the United States as ambassador to conclude a treaty. A deputation of chiefs had in the same year made an unsuccessful application for annexation to Great Britain, and Mamea came to the United States with a view to obtain at least the protection of this Government. President Hayes, in his first annual message, 1877, stated that the object of Mamea's mission was "to invite the Government of the United States to recognize and protect their [Samoa Islands] independence, to establish commercial relations with their people, and to assist them in their steps toward regulated and responsible government." He observed that the subject was deemed worthy of respectful attention and that "the claims upon our assistance by this distant community will be carefully considered."

On January 16, 1878, a treaty between the United States and Samoa was concluded at Washington. By the 2nd article, the Government of the United States was granted "the privilege of entering and using the port of Pagopago, and establishing therein and on the shores thereof a station for coal and other naval supplies," and the Samoan Government engaged that it would thereafter "neither exercise nor authorize any jurisdiction within said port adverse to such rights of the United States or restrictive thereof."<sup>b</sup> In the 5th article it was provided that if any differences should arise between the Samoan Government and any other government in amity with the United States, the Government of the United States would "employ its good offices for the purpose of adjusting those differences upon a satisfactory and solid foundation." No provision was made for a protectorate. In 1877 however, and again in 1878, the flag of the United States was raised by different American consular representatives at Apia as the sign of a protectorate, but on neither occasion was the act sustained by the United States.

<sup>a</sup> H. Ex. Doc. 161, 44 Cong. 1 sess., 128; Nineteenth Century, February, 1886, 298-300.

<sup>b</sup> See, as to the American construction of this stipulation, Mr. Foster, Sec. of State, to Mr. White, chargé at London, Nov. 21, 1892, For. Rel. 1892, 243.

January 24, 1879, a treaty was concluded between Germany and Samoa, by which the latter conceded to the former the right to establish a naval station in the harbor of Saluafata, and engaged not to grant a similar right in that harbor to any other nation.

On August 28, in the same year, a treaty was concluded between Samoa and Great Britain, by the eighth article of which a right was granted to the latter to establish "a naval station and coaling depot" on the shores of a Samoan harbor thereafter to be designated by her Britannic Majesty, there being excepted from this right the harbors of Apia and Saluafata, and "that part of the harbor of Pagopago" which might thereafter be "selected by the Government of the United States as a station."<sup>a</sup>

President Hayes stated in his third annual message, 1879, that a naval vessel had been sent to the Samoan Islands to make surveys and take possession of the privileges conceded to the United States by Samoa in the harbor of Pagopago, and that a coaling station was to be established there which would be convenient and useful to United States vessels. In his fourth annual message, 1880, he recommended that the jurisdiction of the United States consul at Apia be "increased in extent and importance so as to guard American interests in the surrounding and outlying islands of Oceanica."<sup>b</sup>

For a number of years before the treaties with foreign powers were made, the situation in the islands was exceedingly unsatisfactory. The natives, unaccustomed to a centralized government, were restive under the exercise of authority, and their discontent was ministered to and aggravated by the intrigues and rivalries of foreign interests. This condition of things gave rise from time to time to grave disturbances, and not infrequently to open hostilities, between the native factions. Early in 1885 a crisis occurred in the affairs of the islands.

On November 10, 1884, a treaty was signed at the German consulate at Apia by Malietoa, King of Samoa, and Dr. Steubel, acting Imperial German consul, by which a German-Samoan council of state was to be formed, a German adviser was to be appointed to the King, and a special police force was to be appointed and to be under the control of the German member of the Samoan Government.<sup>c</sup> The English and American residents objected

<sup>a</sup>See Mr. Foster, Sec. of State, to Mr. White, chargé at London, Nov. 21, 1892, For. Rel. 1892, 243. See, also, Mr. Evarts, Sec. of State, to Mr. Thompson, Sec. of Navy, April 8, 1880, 132 MS. Dom. Let. 434.

<sup>b</sup>See, also, Mr. Evarts, Sec. of State, to Mr. von Thielmann, June 15, 1877, MS. Notes to Germany, IX. 326; Mr. Evarts, Sec. of State, to Mr. Welsh, May 15, 1879, MS. Inst. Great Britain, XXV. 405.

<sup>c</sup>H. Ex. Doc. 238, 50 Cong. 1 sess. 5.

to the convention, and Malietoa, when advised of its full meaning, refused to carry it out. On December 31, 1885, the German consul, as an act of reprisal, attached the sovereign rights of Malietoa in the municipality of Apia, and an armed force from the German man-of-war *Albatross* hauled down the Samoan flag from the Government House.<sup>a</sup>

Mr. Bayard, Secretary of State, when advised of these events, instructed the American minister at Berlin: "You will temperately but decidedly, in oral conference, <sup>notify</sup> the German minister for foreign affairs that we expect nothing will be done to impair the rights of the United States under the existing treaty with Samoa, and anticipate fulfilment of solemn assurances heretofore and recently given that Germany seeks no exclusive control in Samoa."<sup>b</sup> The German Government replied that it intended to maintain the condition which had previously existed, and that if any wrong had been done it should be righted.<sup>c</sup> Affairs remained in this state till May 13, 1886, when the United States consul, Greenebaum, in compliance with the request of Malietoa, issued a proclamation declaring the islands to be under the protection of the United States, and raised the Samoan flag on the Government House with the American flag over it.<sup>d</sup>

June 1, 1886, the ministers of the United States at London and Berlin were instructed to say that the claim of an American protectorate over Samoa by the United States consul at Apia was wholly unauthorized and disapproved, no separate protectorate by any nation being desired; and to suggest that the British and German ministers at Washington be instructed to confer with the Secretary of State with a view to the establishment of order. This suggestion was accepted with the modification that, before the conference was held, each of the three Governments should send an agent to Samoa to investigate and report upon the situation in the islands.<sup>e</sup>

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<sup>a</sup>H. Ex. Doc. 238, 50 Cong. 1 sess. 24. "The latest intelligence from Samoa shows that the native chiefs and the King resenting the action of the German consul in constraining them to sign a treaty giving him greater jurisdictional powers, had sent a special message to Fiji offering the islands to the British Crown. It may be inferred from this that the German consul's action in raising the German flag was taken to prevent annexation to Great Britain. It is doubtful whether expediency or treaty right gives us any ground for intervening to prevent annexation." (Mr. Frelinghuysen, Sec. of State, to Mr. Miller, M. C., Feb. 27, 1885, 154 MS. Dom. Let. 352.)

<sup>b</sup>H. Ex. Doc. 238, 50 Cong. 1 sess. 15, telegram of January 12, 1886. See Mr. Bayard, Sec. of State, to Mr. von Alvensleben, German min., Dec. 9, 1885, and Jan. 11, 1886, MS. Notes to Germany, X. 404, 442.

<sup>c</sup>H. Ex. Doc. 238, 50 Cong. 1 sess. 16. See Mr. Bayard, Sec. of State, to Mr. Carter, Hawaiian Min., Nov. 11, 1885, MS. Notes to Hawaii, I. 109.

<sup>d</sup>H. Ex. Doc. 238, 50 Cong. 1 sess. 24, 26.

<sup>e</sup>H. Ex. Doc. 238, 50 Cong. 1 sess. 29. See Mr. Bayard, Sec. of State, to Mr. Whitney, Sec. of Navy, March 31 and April 1, 1886, 159 MS. Dom. Let. 483, 498.

This preliminary having been accomplished, a conference was held at Washington in June and July, 1887, between the Secretary of State and the British and German ministers. It was adjourned on the 26th of July by unanimous consent till the autumn, in order that the members might consult their respective Governments with a view to reconcile certain divergencies of view which the discussions had disclosed. The German Government proposed, in the conference, a plan to commit the practical control of Samoan affairs to a single foreign official, called an adviser to the King, and to be appointed by the power having the preponderance of commercial interests. The plan proposed by the United States was to commit the administration of the laws to an executive council to be composed of the Samoan King and vice-king and three foreigners, one of whom should be designated by each of the treaty powers, but who should hold their commissions and receive their compensation from the native Government so as to be independent of the influence and control of the powers designating them. It was also proposed by the United States that any arrangement that might be devised should be embodied by the powers in identic, but several and independent, treaties with Samoa. Germany objected to the plan of the United States on the ground that it did not promise a solution of existing difficulties, which were largely due to rival foreign interests. The British minister supported the German minister, and, incidentally, the German plan.<sup>a</sup>

It was the understanding of the United States, based upon the diplomatic correspondence and the course of the negotiations, that the *status quo* in the islands should be preserved pending the settlement by the three powers.<sup>b</sup>

**Rupture of the status quo.**

Immediately after the suspension of the conference, however, the

<sup>a</sup> For. Rel. 1894, App. I. 508. The protocols of the conference are printed in S. Ex. Doc. 102, 50 Cong. 2 sess., and are reprinted in For. Rel. 1889, 204-236. These protocols were prepared by the editor of the present work, who was present at the conference.

Light is thrown on the course of the British minister in the conference by a dispatch of the British ambassador at Berlin to his Government January 24, 1885, narrating a conversation with Prince Bismarck in relation to the "political estrangement" between the two countries. During the interview Prince Bismarck read to the British ambassador an instruction which he had sent during the previous year to the German ambassador at London. This instruction, said the British ambassador, "was a very remarkable one. It stated the great importance which the Prince attached to the colonial question, and also the friendship of Germany and England. It pointed out that in the commencement of German colonial enterprise England might render signal service to Germany, and said that for such services Germany would use her best endeavors in England's behalf in questions affecting her interests nearer home." It also intimated that, if an understanding could not be reached with England, Germany would seek assistance from France. To give point to this intimation, Prince Bismarck also read to the ambassador a draft of another instruction which he was just then sending to London, in which the Egyptian question was mentioned. (H. Ex. Doc. 238, 50 Cong. 1 sess. 61-63; German Staatsarchiv, XLIV. 252.)

<sup>b</sup> H. Ex. Doc. 238, 50 Cong. 1 sess. 114-116.

German Government, without previous notice to the other powers, instructed its representative in Samoa to make a demand on Malietoa for reparation for certain wrongs alleged to have been committed by him and his people long before the assembling of the conference, and if he should be unwilling or unable to afford satisfaction to declare war upon him "personally."<sup>a</sup> War was declared, Malietoa was dethroned and deported, and Tamasese, who had some time previously been vice-king, but had lately been in arms against the government, was installed as King, with a German named Brandeis, who had long been connected with German commercial interests in Samoa, as adviser.<sup>b</sup> In September, 1888, however, many of the natives revolted against the government of Tamasese, and chose Mataafa as King. Hostilities ensued and some German marines, who had been sent ashore, were ambushed by Mataafa's forces, and some of them were killed. Martial law was proclaimed by the German consul at Apia.

“Had the Government of the United States entertained any designs of territorial aggrandizement or of political control in Samoa, they could have been accomplished, it is believed, with much satisfaction to a majority of the natives and with little opposition from any of them, long prior to the date of either the British or the German treaty. But another and widely different policy has guided the action of the United States in respect to the native communities in the southern Pacific, and it is not, I apprehend, claiming too much credit for this Government to express the opinion that the example it exhibited of treating with Samoa as an independent state led to a similar course and a similar acknowledgment of native independence in that island group by Germany and Great Britain. . . .

“Should the opinion which has been expressed as to the part taken by the United States in seeking to preserve the independence of the Samoan Islands seem in any degree extravagant, it will no longer appear to be so when what has taken place in the last three years in regard to other island groups in the Pacific is considered.

“Prior to that period Spain was holding the Ladrone or Marianne and the Philippine Islands, and had also laid the basis of a claim of title to the Caroline Islands, although she did not maintain an active government there.

“Between the years 1842 and 1847 France established a protectorate over the Marquesas, Society, and Paumotu groups, and in 1853 occupied New Caledonia. In 1864 she formally assumed control of the Loyalty Islands, and in 1880 added Tahiti to the list of her colonies in the Pacific.

<sup>a</sup> H. Ex. Doc. 238, 50 Cong. 1 sess. 84, 89.

<sup>b</sup> H. Ex. Doc. 238, 50 Cong. 1 sess. 91-95.



“In addition to the continent of Australia, to which Great Britain holds a comparatively ancient title, that Government had also acquired the Fiji Islands and New Zealand, the sovereignty of the latter being ceded in 1840 and that of the former on the 10th of October, 1874.

“Germany had not then entered upon her present active policy of colonization in the Pacific, although her subjects had carried on a considerable commerce there, and had established places of trade on various islands, including the Samoan.

“Such was the condition of affairs at the beginning of the present decade, nor was there observable at that time any marked evidence of the desire for new territorial acquisitions; but, beginning in 1884, numerous island groups have, in rapid succession, passed in whole or in part under the control of various European powers, until almost the last vestige of native autonomy in the islands of the Pacific has been obliterated.

“The year 1884 witnessed the occupation by Germany of the northern side of New Guinea, from Cape William to Astrolabe Bay, the imperial flag being hoisted at twelve different points. Almost coincidentally Great Britain occupied the south coast of the island, and in the months of November and December, in the same year, seized and occupied the Louisiade group, Woodlark Island, and Long and Rook Islands.

“In the following year arose the dispute between Germany and Spain over the Carolines, which was terminated by the protocol signed at Rome on the 17th of December, 1885, under which Germany acknowledged the sovereignty of Spain over these islands and the Pelew group, and they have now passed finally under Spanish control.

“But these events were merely the precursors of others, of which the seizure by France in 1886 of the New Hebrides was not the most significant. On the 6th of April of that year a joint declaration was made by Germany and Great Britain, which contemplated the absorption by those two powers of almost all the independent territory in that part of the Pacific Ocean called the West Pacific, lying between the 15th degree of north and the 30th degree of south latitude, and between the 165th degree of longitude west and the 130th degree of longitude east of Greenwich, which had not already been occupied by some foreign power. Through that part of the Pacific included in those bounds of latitude and longitude a line of division was drawn to mark the respective spheres of British and German influence and annexation, and each joint declarant agreed not to make any acquisitions of territory, nor to establish protectorates, nor to oppose the operations of the other in the sphere of action respectively assigned to it.”

“Under this declaration and agreement, from which Samoa, Tonga, and Niné Island were excepted, and by the line of division drawn as

above stated, New Ireland, New Britain, and the adjacent western half of the Solomon group passed under the dominion of Germany, and certain islands west of the line to Great Britain.

"On the 1st of August, in the same year, the latter Government took possession of the Kermadec Islands, and by the imperial decree of the 13th of the ensuing month the Marshall, Brown, and Providence Islands and groups were occupied by Germany.

"As the result of what has been above detailed, of the vast aggregate of territory in the Pacific Ocean, but a few island groups, containing a few thousand square miles, remain to-day as independent and autonomous.

"Long anterior the United States had acquired, by discovery and occupation, the uninhabited island, or ocean reef, of Midway, as a possible coaling station.

"In view of these facts, it is unnecessary to emphasize the importance attached by this Government to the maintenance of the rights to which the United States has become entitled in any of the few remaining regions now under independent and autonomous native governments in the Pacific Ocean."

Mr. Bayard, Sec. of State, to Mr. Pendleton, minister to Germany, January 17, 1888, H. Ex. Doc. 238, 50 Cong. 1 sess. 109, 111-113.

In September, 1888, a native revolt took place against the Government of Tamasese. Mataafa was proclaimed king by the opposition, and a civil war ensued. On January 10, 1889, Count Arco, the German minister at Washington, informed Mr. Bayard that the German commander in Samoan waters, after notice to the commanders of the American and British men-of-war, had landed forces for the protection of German plantations; that these forces on landing were attacked by the Samoans, under the command of an American named Klein, and had suffered a loss of fifty men in killed and wounded. A state of war with Samoa was therefore announced by Germany, and Count Arco was instructed, as an American was alleged to have commanded the attacking Samoans, to make a complaint to the United States. At the same time he was ordered to say that the treaty rights of the United States would be respected by Germany under all circumstances, as well as all the rights of the treaty powers. The German Government also invited the United States to join in an active effort to restore calm and quiet in the islands, in the interest of all the treaty powers.<sup>a</sup>

The Government of the United States replied that it had no knowledge, nor any reason to believe, that Klein was a citizen of the United States, and that it was certain that he "was not, and never had been,

<sup>a</sup>S. Ex. Doc. 68, 50 Cong. 2 sess. See the full text of Prince Bismarck's communication, subsequently made, H. Ex. Doc. 118, 50 Cong. 2 sess. 15.

in any way connected with its public service, nor acting under color or pretense of its authority.”<sup>a</sup> The President had already given orders looking to the protection of American citizens and their property in Samoa, and was ready to give his cooperation for the restoration of peace and order in the islands; and to this end it was suggested that, as the free election by the Samoans of a king was a point agreed on in the summer of 1887, the carrying out of that measure would tend to allay the existing strife. It was also stated that Admiral Kimberly, commanding the United States naval forces in the Pacific, had been ordered to proceed in his flagship to Apia, and the hope was expressed that instructions based on principles of friendly justice and considerate moderation would be given to the commanders of the imperial naval forces.<sup>b</sup>

Admiral Kimberly was instructed that the United States was willing to cooperate in restoring order in Samoa “on the basis of the full preservation of American treaty rights and Samoan authority, as recognized and agreed to by Germany, Great Britain, and the United States,” and that the German Government had been so informed. He was to extend full protection and defense to American citizens and property, and inform himself as to the situation; to protest against the subjugation and displacement of the native government by Germany, as in violation of the positive agreement and understanding between the treaty powers, but to inform the representatives of the British and German Governments of his readiness to cooperate in causing all treaty rights to be respected and in restoring peace and order on the basis of the recognition of the Samoan right to independence.<sup>c</sup>

President Cleveland, in communicating these papers to Congress, said: “Acting within the restraints which our Constitution and laws have placed upon executive power, I have insisted that the autonomy and independence of Samoa should be scrupulously preserved according to the treaties made with Samoa by the powers named and their agreements and understandings with each other. I have protested against every act apparently tending in an opposite direction, and during the existence of internal disturbance one or more vessels of

<sup>a</sup>Klein, and three natives who were with him, swore that he advised the natives not to fire, and hailed the German boats to warn them of their danger; that the German marines fired first, and that he did not advise the Samoans to return the fire. Two other natives swore that he hailed the boats, but that he took command of the Samoans in the ensuing fight. (Correspondence respecting affairs in Samoa, printed for the use of the Am. Commissioners to Berlin.)

<sup>b</sup>Mr. Bayard, Sec. of State, to Count Arco, German min., Jan. 12, 1889, S. Ex. Doc. 68, 50 Cong. 2 sess. 19-21.

<sup>c</sup>Mr. Whitney, Sec. of the Navy, to Adm. Kimberly, Jan. 11, 1889, S. Ex. Doc. 68, 50 Cong. 2 sess. 21.

war have been kept in Samoan waters to protect American citizens and property. . . . The attention of the Congress is especially called to the instructions given to Admiral Kimberly, dated the 11th instant, and the letter of the Secretary of State to the German minister, dated the 12th instant, which will be found among the papers herewith submitted. . . . The subject in its present stage is submitted to the wider discretion conferred by the Constitution upon the legislative branch of the Government."<sup>a</sup>

On January 31, 1889, the minister of the United States at Berlin, on the strength of advices from Apia that the German consul had declared his Government to be at war with Mataaafa, and Samoa to be under martial law, was instructed to say that the United States assumed that German officials in the islands would be instructed carefully to refrain from interference with American citizens and property there, since the United States could not concede that German jurisdiction could be extended by the declaration of martial law so as to include control of Americans. Prince Bismarck replied that, although to a certain extent international law would not prevent such a measure, he was of opinion that the military authority had gone too far in the particular instance, and that instructions had been given to withdraw that part of the proclamation which related to foreigners. The German consul had also been instructed to withdraw a request which he had made to the native authorities that the administration of the islands might be temporarily handed over to him, such a request not being in conformity with previous promises touching the neutrality and independence of Samoa.<sup>b</sup>

On the 28th of January, 1889, the German minister at Washington stated that a proposition from his Government for a conference was on its way by mail. It was communicated to the Department of State on the 4th of February. It proposed "a resumption of the consultation which took place between the representatives of Germany, England, and the United States in 1887, at Washington, and at that time adjourned without any possibility of their representatives coming to any agreement." Berlin was suggested as the place of meeting. It was also stated that it was not the intention of Germany to put in question the independence of the island group nor the equal rights of the powers.

The proposals of Prince Bismarck were accepted with a statement that it appeared to be essential that a truce should be forthwith proclaimed and further armed action arrested, and, except as the situation might be changed by the free election of a king by the natives, that the affairs in the islands should remain *in statu quo* pending the conference.<sup>c</sup>

<sup>a</sup> Message of Jan. 15, 1889, S. Ex. Doc. 68, 50 Cong. 2 sess.

<sup>b</sup> H. Ex. Doc. 102, 50 Cong. 2 sess.

<sup>c</sup> S. Ex. Doc. 102, 50 Cong. 2 sess.

With certain ultimate reservations, these conditions were accepted, and it was agreed that a conference should be held; but, in view of the approaching end of the Administration, the appointment of plenipotentiaries on the part of the United States was left by President Cleveland to his successor.<sup>a</sup>

The plenipotentiaries appointed by the United States were Messrs. John A. Kasson, William Walter Phelps, and George H. Bates; by Germany, Count Herbert von Bismarck, Baron von Holstein, and Dr. Krauel; by Great Britain, Sir Edward Malet, Mr. Charles Stewart Scott, and Mr. Joseph Archer Crowe. The instructions of the American plenipotentiaries were signed by Mr. Blaine, as Secretary of State, and bore date April 11, 1889. They were comprehensive in their nature. With regard to the plan presented by Mr. Bayard in the conference of 1887 for the establishment in Samoa of an executive council to consist of the Samoan King and vice-king and three foreigners, one of whom should be nominated by each of the three treaty powers, but who should be appointed and paid by the native Government—a plan which was to be carried out through identic, yet separate and independent treaties with Samoa—Mr. Blaine said: “This scheme itself goes beyond the principle upon which the President desires to see our relations with the Samoan Government based, and is not in harmony with the established policy of this Government. For, if it is not a joint protectorate, to which there are such grave and obvious objections, it is hardly less than that, and does not in any event promise efficient action.” The plenipotentiaries were also to propose as the basis of the conference the restoration of the *status quo* as it existed in 1887.<sup>b</sup>

The representatives of the three powers met in Berlin April 29, 1889. At the first conference Count Bismarck stated that Malietoa, having “expressed his regret and the earnest wish to be reconciled with the German Government,” had been released and was at liberty to go wherever he pleased. This statement was received with expressions of satisfaction by the American and British delegations. At the ninth and last formal conference, June 14, 1889, there was signed what was described as the “General Act of the Conference at Berlin.”<sup>c</sup> The discussions in the conferences were conducted, and the protocols drawn up, in the English language.<sup>d</sup> The principal features of the government planned by this treaty were a supreme court, to consist of one judge, styled chief justice of Samoa, who was to be appointed by the three treaty powers, or, if they could not agree, by the King of Sweden and Norway; a municipal government for the district of Apia, by a council whose president was to be agreed upon by the powers; a special commission for the permanent settlement of

<sup>a</sup> Confidential Executive E., 50 Cong. 2 sess.

<sup>c</sup> For. Rel. 1889, 353.

<sup>b</sup> For. Rel. 1889, 195, 198, 201.

<sup>d</sup> Id. 367-368.

claims and titles to lands, and a system of revenue consisting of import and export duties, capitation and license taxes, and certain occasional duties.<sup>a</sup>

The Samoan Government gave its formal adherence to the treaty, and it was put into operation. Difficulties were, however, encountered in the administration of the new government. A part of the natives, under the lead of

Difficulties in administration.

Mataafa, opposed the new government and disregarded its processes till, in July, 1893, civil war again broke out. The treaty powers then intervened with their naval forces to maintain Malietoa, who had returned to the islands and been reelected as King. Difficulties were also encountered in separating the jurisdiction of the supreme court and of the municipal council of Apia. The native hostilities were after a time suppressed, and Mataafa and eleven other chiefs deported. But hostilities broke out again in March, 1894, the rebels being this time under the lead of Tamasese. Under such conditions, the revenues of the islands proved to be insufficient to meet the expenses of government, and the treaty powers were obliged to make the necessary advances.<sup>b</sup>

"In my last annual message I referred briefly to the unsatisfactory state of affairs in Samoa under the operation of the Berlin treaty, as signally illustrating the impolicy of entangling alliances with foreign powers, and on May 9, 1894, in response to a resolution of the Senate, I sent a special message and documents to that body on the same subject, which emphasized my previously expressed opinions. Later occurrences, the correspondence in regard to which will be laid before Congress, further demonstrate that the Government which was devised by the three powers and forced upon the Samoans against their inveterate hostility can be maintained only by the continued presence of foreign military force and at no small sacrifice of life and treasure. . . .

"The present Government has utterly failed to correct, if indeed it has not aggravated, the very evils it was intended to prevent. It has

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<sup>a</sup> President Harrison, in his annual message of Dec. 3, 1889, expressed the hope that the treaty would result in "the permanent establishment of law and order in Samoa upon the basis of the maintenance of the rights and interests of the natives as well as of the treaty powers."

"An appalling calamity befell three of our naval vessels on duty at the Samoan Islands, in the harbor of Apia, in March last, involving the loss of four officers and forty-seven seamen, of two vessels, the *Trenton* and the *Vandalia*, and the disabling of a third, the *Nipsic*. Three vessels of the German navy, also in the harbor, shared with our ships the force of the hurricane and suffered even more heavily. While mourning the brave officers and men who died, facing with high resolve perils greater than those of battle, it is most gratifying to state that the credit of the American Navy for seamanship, courage, and generosity was magnificently sustained in the storm-beaten harbor of Apia." (President Harrison, Ann. Msg., Dec. 3, 1889.)

<sup>b</sup> For. Rel. 1894, App. I. 511-513; S. Ex. Doc. 93, 53 Cong. 2 sess.; S. Ex. Doc. 132, 53 Cong. 2 sess.; S. Ex. Doc. 97, 53 Cong. 3 sess. As to the payment of the expenses of the banished chiefs, see For. Rel. 1896, 533, 534.

not stimulated our commerce with the islands. Our participation in its establishment against the wishes of the natives was in plain defiance of the conservative teachings and warnings of the wise and patriotic men who laid the foundations of our free institutions, and I invite an expression of the judgment of Congress on the propriety of steps being taken by this Government looking to the withdrawal from its engagements with the other powers on some reasonable terms not prejudicial to any of our existing rights."

President Cleveland, Ann. Msg., Dec. 3, 1894.

The message of May 9, 1894, above referred to, was accompanied with a report of Mr. Gresham, Secretary of State, of the same date, presenting a comprehensive survey of the relations of the United States and Samoa. Such a survey Mr. Gresham declared to be specially important, "since it is in our relations to Samoa that we have made the first departure from our traditional and well-established policy of avoiding entangling alliances with foreign powers in relation to objects remote from this hemisphere. Like all other human transactions," said Mr. Gresham, "the wisdom of that departure must be tested by its fruits. If the departure was justified, there must be some evidence of detriment suffered before its adoption, or of advantage since gained, to demonstrate the fact. If no such evidence can be found we are confronted with the serious responsibility of having, without sufficient grounds, imperiled a policy which is not only coeval with our Government, but to which may, in great measure, be ascribed the peace, the prosperity, and the moral influence of the United States. Every nation, and especially every strong nation, must sometimes be conscious of an impulse to rush into difficulties that do not concern it, except in a highly imaginary way. To restrain the indulgence of such a propensity is not only the part of wisdom, but a duty we owe to the world as an example of the strength, the moderation, and the beneficence of popular government. . . .

"Soberly surveying the history of our relations with Samoa, we well may inquire what we have gained by our departure from our established policy beyond the expenses, the responsibilities, and the entanglements that have so far been its only fruits. One of the greatest difficulties in dealing with matters that lie at a distance is the fact that the imagination is no longer restrained by the contemplation of objects in their real proportions. Our experience in the case of Samoa serves to show that for our usual exemption from the consequences of this infirmity, we are indebted to the wise policy that had previously preserved us from such engagements as those embodied in the general act of Berlin, which, besides involving us in an entangling alliance, has utterly failed to correct, if indeed it has not aggravated, the very evils which it was designed to prevent." (S. Ex. Doc. 93, 53 Cong. 2 sess.; For. Rel. 1894, App. I, 504, 513.)

In his annual message of Dec. 2, 1895, President Cleveland said: "I again press this subject upon the attention of the Congress and ask for such legislative action or expression as will lead the way to our relief from obligations both irksome and unnatural."

As to difficulties affecting the municipal council of Apia, see For. Rel. 1895, II. 1126, 1128; For. Rel. 1896, 535, 536, 543, 544, 548, 551-552; For. Rel. 1897, 449-451.

As to questions concerning the revenues, see For. Rel. 1897, 454-456.

As to the importation of arms and ammunition, see For. Rel. 1895, II. 1130, 1133-1135, 1141-1159; For. Rel. 1896, 546, 549, 551.

A question as to the jurisdiction of the municipal magistrate of Apia over offences of men-of-war's men is discussed, but not decided, in For. Rel. 1896, 552-561.

"The United States . . . necessarily continues to exercise all stipulated rights and duties under the tripartite general act of Berlin during the continuance of that compact, however irksome and unnatural those rights and duties may prove to be."

Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896, p. lxxx.

In a note to Baron von Thielmann, (German ambassador, April 28, 1896, Mr. Olney said: "The treaty [of June 14, 1889] is unsatisfactory to the United States, and is one which its interests require to be essentially modified or altogether abrogated." (For. Rel. 1896, 534-545.)

In April, 1898, the three consuls at Apia, having just received notice that certain rebellious chiefs had raised a separate flag at Leulumolga, decided to submit to the treaty powers the question of the return of the exiled chiefs to Samoa, as a measure likely to strengthen Malietoa's government. The suggestion was adopted.<sup>a</sup>

**Strife over the  
kingship.**

"Malietoa Laupepa, King of Samoa, died on August 22d last. According to Article I. of the general act of Berlin 'his successor shall be duly elected according to the laws and customs of Samoa.'

"Arrangements having been agreed upon between the signatories of the general act for the return of Mataafa and the other exiled Samoan chiefs, they were brought from Jaluit by a German war vessel and landed at Apia on September 18th last.

"Whether the death of Malietoa and the return of his old-time rival Mataafa will add to the undesirable complications which the execution of the tripartite general act has heretofore developed remains to be seen. The efforts of this Government will, as heretofore, be addressed toward a harmonious and exact fulfillment of the terms of the international engagement to which the United States became a party in 1889."

President McKinley, Ann. Msg., Dec. 5, 1898.

The contest over the kingship gave rise to native hostilities, and these led to the forcible intervention of the foreign naval forces. In March, 1899, Lord Salisbury proposed that the treaty powers should, with a view to restore tranquillity, appoint a joint commission to undertake the provisional government of the islands.<sup>b</sup> This proposal was

<sup>a</sup>For. Rel. 1899, 604-610.

<sup>b</sup>For. Rel. 1896, 614-616. By a convention between the United States, Germany, and Great Britain, signed at Washington, Nov. 7, 1899, all claims of the citizens or subjects of the contracting parties "for compensation on account of losses which they allege that they have suffered in consequence of unwarranted military action, if this



accepted; but, before the arrival of the Commission, the Chief Justice, Mr. Chambers, had decided that Malietoa Tanu had been elected King, and the adherents of Mataafa had endeavored to contest his rights by force. The foreign residents were divided in sympathy between the factions, and their feelings of antagonism extended even into private life.<sup>a</sup>

The commission of the treaty powers was composed of Messrs. Bartlett Tripp, for the United States; H. Sternburg, for Germany; and C. N. E. Eliot, for Great Britain.

**Joint Commission of  
Treaty Powers.**

Mr. Tripp was elected by his associates as chairman. One of the first acts of the commission was to secure the assent of the natives to the suspension of the kingship, the duties of the office being provisionally confided to the three consuls. The final report of the commissioners bears date July 18, 1899. They found that the principal sources of disorder in the group were (1) the kingship, (2) the rivalries of foreign nationalities, (3) the absence of regular government outside the municipality of Apia, and (4) the distribution of large quantities of arms among the natives in consequence of the insufficient enforcement of the customs regulations. They recommended that the office of King be permanently abolished.<sup>b</sup>

Mr. Tripp also made an individual final report, dated August 7, 1899.

In it he said: "We arrived in Apia on the 13th of May, 1899, making the seventh of the fleet of war vessels of the three great powers then anchored in that quiet little harbor—three English, three American, and one German . . . , but not the sail or smoke of a single vessel of commerce was to be seen there or about the coasts of these beautiful islands. On land patrolling the streets and at every crossing were soldiers, white and native, demanding the password of resident and stranger. A thousand natives in native uniform, but armed with British rifles and commanded by British officers, paraded past us in response to the salutes from vessels of war, while as many more natives, armed with every species of warlike implement, in command of native officers, came from their camps to

be shown to have occurred, on the part of American, German, or British officers between the first of January last and the arrival of the Joint Commission in Samoa," were referred to His Majesty the King of Sweden and Norway, as arbitrator, to be decided "in conformity with the principles of international law or considerations of equity," the three Governments agreeing jointly or severally to make good such losses, according to the award. The benefits of the convention were also extended, conditionally, to such persons, not natives of Samoa, as were under the protection of any of the three Governments but not included in the foregoing categories. It was subsequently agreed to refer to the arbitrator certain claims of French citizens. (Mr. Hill, Acting Sec. of State, to the Swedish Leg., Sept. 27, 1900, MS. Notes to Swedish Leg., VIII. 169; Mr. Hay, Sec. of State, to Count Quadt, Oct. 22, 1900, MS. Notes to German Leg., XII. 607; For. Rel. 1900, 473-476, 522-525, 625-629, 896.)

<sup>a</sup>For. Rel. 1899, 616.

<sup>b</sup>For. Rel. 1899, 636-648. See, also, Parl. Pap., Samoa, No. 1 (1899).

witness our arrival. At a distance from the town of perhaps three miles and encircling it on all sides were the native troops of **Mataafa**, estimated at about 3,000 men, armed with rifles, head knives, spears, and such weapons of war as the natives could command, resting upon their arms behind their lines of improvised fortifications under the terms of the armistice which had been proclaimed by the vessels of war pending the arrival of the commission. But a few days prior the English and American ships had shelled the town, and the people had left the rear and exposed portions and were huddled together in the houses along the beach and out of the way of and protected by the guns of the ships which had been directed against the forts and lines of **Mataafa** surrounding the place. Excitement and alarm prevailed everywhere and this condition of nervous excitement had reached its height when the commission arrived."<sup>a</sup>

Mr. Tripp said that he was informed by Chief Justice Chambers that during his entire stay in Samoa the writs of his court running in the name of **Malietao Laupepa** as king could not be enforced even in times of apparent peace in several large districts of Samoa. No king ever was able to maintain his authority over all the districts at the same time, and some of the more powerful chiefs were continually in rebellion.<sup>b</sup>

In another place Mr. Tripp said: "While I have no doubt that any one of the great powers could easily govern these islands in the manner proposed, I fear their ability to do so when acting together, and I can not forbear to impress upon my Government not only the propriety but the necessity of dissolving this partnership of nations which has no precedent for its creation nor reason for its continuance."<sup>c</sup>

In another place Mr. Tripp, referring to **Pagopago**, said: "I can not impress upon my Government too strongly the necessity of its undivided possession of this harbor. It is the only one worthy of the name in the islands."<sup>d</sup>

September 7, 1899, Mr. Hay telegraphed to Mr. Choate, American **Division of the** ambassador in London, that the German Government **group.** strongly urged the partition of the Samoan Islands, the United States to retain **Tutuila** and adjacent islands, and England and Germany to divide the rest; and that the President was disposed to regard the proposition with favor if the details could be satisfactorily arranged. Mr. Choate was instructed to ascertain the views of the British Government.<sup>e</sup>

By a convention concluded November 14, 1899, between Germany and Great Britain, the latter renounced all her rights over the Samoan Islands, and recognized as falling to Germany the territories in the

<sup>a</sup> For. Rel. 1899, 648-649; S. Doc. 51, 56 Cong. 1 sess.

<sup>b</sup> For. Rel. 1899, 654.

<sup>c</sup> For. Rel. 1899, 659.

<sup>d</sup> For. Rel. 1899, 662.

<sup>e</sup> For. Rel. 1899, 663.

eastern part of the neutral zone established by the arrangement of 1888 in West Africa. Germany, on the other hand, renounced in favor of Great Britain all her rights over the Tonga Islands, including Vivau, and over Savage Island, and recognized as falling to Great Britain certain of the Solomon Islands (including the Howe Islands), and the western part of the neutral zone in West Africa. The declaration between the two Governments of April 10, 1886, respecting freedom of commerce in the western Pacific, was declared to apply to the islands mentioned in the convention. It was also agreed that Germany should consider the question of reciprocal tariffs in the territories of Togo and the Gold Coast, and give up her extraterritorial rights in Zanzibar whenever the similar rights enjoyed there by other nations should be abolished.<sup>a</sup>

By a treaty between the United States, Germany, and Great Britain, concluded December 2, 1899, both the latter powers renounced in favor of the United States all their rights over the island of Tutuila, and all other islands of the group east of longitude 171° west of Greenwich, while the United States renounced in favor of Germany all rights over the islands of Upolu and Savaii and all other islands of the group west of longitude 171° west of Greenwich. It was further agreed that each of the three powers should "continue to enjoy, in respect of their commerce and commercial vessels, in all the islands of the Samoan group privileges and conditions equal to those enjoyed by the sovereign power, in all ports which may be open to the commerce of either of them." Finally, the general act of Berlin of June 14, 1889, and all previous treaties and agreements relating to the islands, were annulled.<sup>b</sup>

By this arrangement Tutuila, containing the harbor of Pagopago, Tutuila and the passed, with the adjacent islands, under the exclusive harbor of Pago- jurisdiction of the United States. Their administra- Pago. tion was placed under the direction of the Secretary of the Navy, acting through the commandant of the United States naval station at Pagopago.<sup>c</sup>

Under the general act of Berlin a work of permanent value was accomplished in the adjustment of claims to land by Titles to land. means of a joint commission.<sup>d</sup> Measures for the preservation of the records of the commission were taken by the three Governments.<sup>e</sup>

<sup>a</sup> For. Rel. 1899, 665-666.

<sup>b</sup> For. Rel. 1899, 667. See, also, President McKinley's annual message, Dec. 5, 1899.

<sup>c</sup> Mr. Hay, Sec. of State, to Sec. of Treasury, Dec. 6, 1900, 249 MS. Dom. Let. 393; Mr. Hill, Acting Sec. of State, to Sec. of Treasury, Jan. 8, 1901, 250 MS. Dom. Let. 131; and 23 Op. At.-Gen., 630, holding Tutuila to be domestic territory.

<sup>d</sup> For. Rel. 1894, App. I. 697, 698, 701, 704, 706, 709-710, 714, 727, 740, 743, 746, 747, 750, 753; For. Rel. 1895, II. 1128, 1129, 1144-1146, 1149, 1150, 1152, 1155, 1159.

<sup>e</sup> For. Rel. 1896, 531, 538, 545; For. Rel. 1897, 448.

The report of the American commissioner, Mr. Chambers, on the results of the land commission, is printed in S. Ex. Doc. 97, 53d Cong. 3d sess. 465-470. It affords a view of the basis on which the division of the group was afterwards made. The claims before the land commission, in the whole group, numbered 3,942, of which 1,422 were German, 1,757 English, 307 American, 326 French, and 130 miscellaneous. The total acreage allowed was 135,000, of which two-thirds belonged to Germans, who, as Mr. Chambers reported, were "the only foreign residents in Samoa who have, on any system, cleared, planted, and otherwise improved their holdings." The claims allowed to Americans amounted to 21,000 acres, the most of which belonged to a San Francisco corporation, which was insolvent and which had no agent in the group; and its lands were understood to be for sale. Mr. Chambers also stated that there were only nineteen bona fide American citizens resident in the islands, exclusive of officials, and that the commerce of the group was chiefly in German hands. The actual state of commercial and landed interests, and also of nationality among the foreign residents, was therefore recognized in the allotment of Upolu and Savaii to Germany, those islands, and especially Upolu, being the principal seats of commerce and planting; while, on the other hand, in the concession of undivided jurisdiction to the United States over Tutuila and the adjacent islands, the exclusive rights of the United States in the harbor of Pagopago were placed beyond dispute.

President McKinley, in his annual message of December 3, 1900, stated that the "settlement of the Samoan problem," under the treaty of December 2, 1899, had "accomplished good results," and that "peace and contentment" prevailed in the islands.

## 12. HORSESHOE REEF; BROOKS OR MIDWAY ISLANDS; WAKE ISLAND.

### § 111.

In a conference at the foreign office, in London, Dec. 9, 1850, Mr. Abbott Lawrence, minister of the United States, **Horseshoe Reef.** referring to the need of a lighthouse near the outlet of Lake Erie, stated that it was found that the most eligible site was "Horseshoe Reef," within British jurisdiction, and that he was instructed to ask whether the British Government would "cede to the United States the Horseshoe Reef, or such part thereof, as may be necessary for the purpose of erecting a lighthouse," and, if not, whether the British Government would itself erect and maintain a lighthouse there.

Lord Palmerston replied that his Government was prepared to advise Her Majesty to cede "such portion of the Horseshoe Reef as may be found requisite for the intended lighthouse, provided the Government

of the United States will engage to erect such lighthouse, and to maintain a light therein; and provided no fortification be erected on the said reef."

It was accordingly agreed that the Crown should make the cession on the conditions named. The lighthouse was erected in 1856.

United States Treaty Volume, 1776-1887, p. 444. In 1884 the Canadian Government granted the United States Lighthouse Board permission to build a crib for a lighthouse near Bar Point, at the mouth of the Detroit River. (Mr. Frelinghuysen, Sec. of State, to Sir L. West, Brit. min., March 20, 1884, MS. Notes to Great Britain, XIX. 430.)

Brooks or Midway Islands, situated about 1,100 miles west of Honolulu, and within the limits assigned by the maps to the Hawaiian group, were formally occupied by Capt. William Reynolds, of the U. S. S. *Lackawanna*, Aug. 28, 1867. An account of their discovery and occupation is given in S. Ex. Doc. 79, 40 Cong. 2 sess., and Sen. Rep. 194, 40 Cong. 3 sess.; and further information in regard to them may be found in a message of President Cleveland to the Senate of Jan. 27, 1888, which was sent in response to a resolution of that body calling for correspondence touching the occupancy of Midway harbor in Midway Island, but does not appear to have been printed as an executive document.

Mr. Moore, Acting Sec. of State, to Mr. Cousins, M. C., July 11, 1898, 230 MS. Dom. Let. 153.

See, also, Mr. Adee, 2nd Assist. Sec. of State, to Mr. Lodge, Jan. 11, 1898, 224 MS. Dom. Let. 350. Besides the Philippines, Hawaii, the Alaskan and Pacific Coast Islands, Guam, Tutuila and other Samoan Islands east of long. 171° W. of Greenwich, and the various Guano Islands, the United States claims jurisdiction over "Brooks or Midway Islands lying 1,100 miles west of Honolulu, . . . and Wake Island." (Mr. Hill, Acting Sec. of State, to Messrs. Perry, Mason & Co., April 18, 1900, 244 MS. Dom. Let. 381.)

The settlement of a colony of six Japanese on the Midway Islands "cannot be regarded by this Government as affording any basis for a claim to the islands by the Japanese Government." (Mr. Hill, Acting Sec. of State, to the Sec. of the Navy, Jan. 10, 1901, 250 MS. Dom. Let. 162, enclosing copy of a dispatch from the United States minister at Tokio of Dec. 13, 1900, stating that he had addressed a note to the Japanese min. of foreign affairs, saying that the islands belonged to the United States.)

"The United States claims jurisdiction . . . over the atoll, known as Wake's Island, latitude 19° 17' 50" north, longitude 166° 31' east, possession of which was taken by the U. S. S. *Bennington* on January 17, 1899."

Mr. Hill, Assist. Sec. of State, to Mr. Page, Feb. 27, 1900, 243 MS. Dom. Let. 246.

After the passage above quoted there is the following paragraph: "There are several small islands south and west of the Hawaiian group said to be

occupied by American citizens, but the United States Government has never asserted rights of jurisdiction or administration over such islands by reason of their occupancy."

To the same effect is Mr. Day, Sec. of State, to Mr. Cousins, July 13, 1898, 230 MS. Dom. Let. 153.

### 13. GUANO ISLANDS.

#### (1) LEGISLATION OF CONGRESS.

#### § 112.

Sections 5570-5578 of the Revised Statutes, embodying the provisions of the Act of Congress of August 18, 1856,<sup>a</sup> contain special rules on the subject of Guano Islands.

Section 5570 provides: "Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other Government, and not occupied by the citizens of any other Government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States."

Section 5571 reads: "The discoverer shall, as soon as practicable, give notice, verified by affidavit, to the Department of State of such discovery, occupation, and possession, describing the island, rock, or key, and the latitude and longitude thereof, as near as may be, and showing that such possession was taken in the name of the United States; and shall furnish satisfactory evidence to the State Department that such island, rock, or key was not, at the time of discovery thereof, or of the taking possession and occupation thereof by the claimants, in the possession or occupation of any other Government, or of the citizens of any other Government, before the same shall be considered as appertaining to the United States."

Section 5572 enables the widow, heir, executor, or administrator of a discoverer, who dies before perfecting proof of discovery or fully complying with the provisions of the statute, to obtain the benefits of the discovery.

By section 5573, "the discoverer, or his assigns, being citizens of the United States, may be allowed, at the pleasure of Congress, the exclusive right of occupying such islands, rocks, or keys, for the purpose of obtaining guano, and of selling and delivering the same to citizens of the United States, to be used therein, and may be allowed to charge and receive for every ton thereof delivered alongside a vessel, in proper tubs, within reach of ship's tackle, a sum not exceeding \$8 per ton for the best quality, or \$4 for every ton taken while in its native place of deposit."

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<sup>a</sup> As to the origin of this act, see papers and statements by Mr. Henry S. Sanford, S. Ex. Doc. 25, 34 Cong. 3 sess. 35, 93; S. Ex. Doc. 10, 36 Cong. 2 sess. 465-466.

By section 5574, the discoverer, his personal representative, or assignee, must give bond, in such penalty and with such sureties as the President may require, to deliver the guano to citizens of the United States only, and for use therein, at the price prescribed, and to provide all necessary facilities for that purpose within a fixed time. This section, however, was suspended for five years from and after July 14, 1872.<sup>a</sup>

By section 5575, the introduction of guano under the statute, and the vessels concerned therein, are subject to the laws regulating the coasting trade.

"SEC. 5576. All acts done and offenses or crimes committed on any such island, rock, or key by persons who may land thereon, or in the waters adjacent thereto, shall be deemed committed on the high seas, on board a merchant ship or vessel belonging to the United States, and shall be punished according to the laws of the United States relating to such ships or vessels and offenses on the high seas, which laws, for the purpose aforesaid, are extended over such islands, rocks, and keys.

"SEC. 5577. The President is authorized, at his discretion, to employ the land and naval forces of the United States to protect the rights of the discoverer or of his widow, heir, executor, administrator, or assigns.

"SEC. 5578. Nothing in this title contained shall be construed as obliging the United States to retain possession of the islands, rocks, or keys after the guano shall have been removed from the same."

The act of August 18, 1856, reenacted in title 71 of the Revised Statutes, is constitutional and valid.

Jones v. United States (1890), 137 U. S. 202. In connection with guano legislation, see reports of the Secretary of State, June 29, 1850, S. Ex. Doc. 59, 31 Cong. 1 sess.; Sept. 27, 1850, S. Ex. Doc. 80, 31 Cong. 1 sess.; March 1, 1854, H. Ex. Doc. 70, 33 Cong. 1 sess.; Jan. 24, 1855, S. Ex. Doc. 31, 33 Cong. 2 sess.; Feb. 5, 1859, S. Ex. Doc. 25, 35 Cong. 2 sess.

Calvo, *Droit Int.* (cinq. ed.), I. 432, § 300.

For articles on guano, see De Bow's Rev. XIX. 219; Chamber's Jour. I. 135, 383; Living Age, XXXVI. 199.

Section 6 of the guano islands act of August 18, 1856, reenacted in section 5576 of the Revised Statutes of the United States, does not assume to extend admiralty jurisdiction over land, but merely extends the provisions of the statutes for the punishment of offenses committed on the high seas to like offenses committed upon guano islands appertaining to the United States, and thus asserts the power of the United

<sup>a</sup>See, also, act of March 3, 1865, sec. 8, 13 Stats. 494; act of July 28, 1866, sec. 3, 14 Stats. 328; opinion of Speed, At.-Gen. (1866), 11 Op. 514; also acts of March 15, 1878, 20 Stats. 30; April 18, 1884, 23 Stats. 11; Jones v. United States (1890), 137 U. S. 202, 224.

States to preserve peace and punish crime in all regions over which it exercises jurisdiction.

*Jones v. United States*, 137 U. S. 202 (1890).

It was therefore held that under sections 730, 5339, 5576, R. S., murder committed on a guano island which had been determined by the President to appertain to the United States, might be tried in the United States court for the district into which the offender was first brought.

The question having been asked by the owner of the right to work a deposit whether his manager might be invested with power to preserve order on the island and to require proper quarantine regulations to be observed by vessels coming from infected ports to load for the United States, reply was made that if the legislation of Congress was not sufficient for the purpose, no power was known to exist in the executive department of the Government "either to prescribe additional laws or to empower others to do so."

Mr. Bayard, Sec. of State, to Messrs. Glidden & Curtis, Dec. 29, 1886, 162 MS. Dom. Let. 445, referring to an opinion of the Attorney-General, of Dec. 15, to that effect.

## (2) CONDITIONS OF ANNEXATION.

### § 113.

To enable the President to exercise the power conferred on him by the act of Aug. 18, 1856, the following facts must be established:

"1. That a deposit of guano has been discovered upon the island by an American citizen.

"2. That the island is not within the lawful jurisdiction of any other government.

"3. That it is not occupied by the citizens of any other government.

"4. That the discoverer has taken and kept peaceable possession thereof in the name of the United States.

"5. That the discoverer has given notice of the facts, as soon as practicable, to the State Department, on his oath.

"6. That the notice has been accompanied with a description of the island, its latitude and longitude.

"7. That satisfactory evidence has been furnished to the State Department, showing that the island was not taken out of the possession of any other government or people."

Black, At.-Gen. (1859), 9 Op. 364, 367.

These conditions were previously enumerated by Attorney-General Black in a letter to the Department of State of June 2, 1857, MS. Misc. Let.

See, also, Mr. Seward, Sec. of State, to Mr. Daggett, Sept. 4, 1867, 77 MS. Dom. Let. 60; to Mr. Phillips, March 2, 1868, 78 id. 151; to Mr. Clark, July 1, 1868, 79 id. 43.

Mr. Fish, Sec. of State, to Mr. Samson, April 12, 1870, 84 MS. Dom. Let. 153; to Mr. Lander, May 20, 1874, 102 MS. Dom. Let. 300; to Mr. Preston, Haytian Minister, Dec. 31, 1872, and June 10, 1873, MS. Notes to Hayti, I. 124, 153.



Mr. Evarts, Sec. of State, to Mr. Fisher, July 7, 1880, 133 MS. Dom. Let. 509.  
 Mr. Frelinghuysen, Sec. of State, to Mr. McCulloch, Dec. 5, 1884, 153 MS. Dom. Let. 366.

See, also, Mr. Hay, Sec. of State, to Mr. Lunt, May, 26, 1899, 237 MS. Dom. Let. 265, as to the alleged discovery of Fox Islands.

“When the President has been satisfied on these points, he may, in his discretion, regard the islands containing the discovered deposits as belonging to the United States, but he is not obliged to do so. The object of the law is to benefit American agriculture by promoting the supply of guano at a reasonable price. Before assuming, therefore, the grave responsibility involved in declaring a guano island to belong to the United States, he must be satisfied that the guano found upon it is in sufficient quantity and quality to justify the measure. And it is only, moreover, when he shall be fully informed with respect to the value of the deposit that he can fix correctly the penalty of the bond required, and determine the securities contemplated by the law.”

Mr. Cass, Sec. of State, to Messrs. Wood and Grant, July 1, 1857, 47 MS. Dom. Let. 166.

Of the same purport is Mr. Cass, Sec. of State, to Messrs. Fabens and Stearns, June 29, 1857, 47 MS. Dom. Let. 157.

The President can not annex a guano island to the United States while a diplomatic question is pending between this Government and that of a foreign nation, growing out of a claim of dominion by the latter over the island.

Black, At.-Gen., 9 Op. 406 (1859).

This opinion related to the island of Cay Verde.

But if the President, in the exercise of his powers under the statute, treats a guano island as appertaining to the United States, this necessarily implies that he is satisfied that the island was not within the jurisdiction of any foreign government; and in such case it is not the province of the courts to determine whether the Executive was right or wrong, but they must act upon the fact as decided by him.

*Jones v. United States* (1890), 137 U. S. 202, 221, 223.

The right of citizens of the United States to the use and control, under the Revised Statutes, of deposits of guano on islands, rocks, and keys, “is based on the discovery not of the island or other place named, but of the deposit of guano. But it must also be shown that the place of the deposit is ‘not within the lawful jurisdiction of any other government’ (sec. 5570, Rev. Stats.); or, as it is again and more specifically expressed, that such place ‘was not at the time of the discovery thereof, or of the taking possession and occupation thereof by the claimants, in the possession or occupation

of any other government or of the citizens of any other government. (Sec. 5571, Rev. Stats.)

“If it be shown that the place of deposit is not subject to the jurisdiction of any other government the determination of the conflicting claims of citizens of the United States belongs exclusively to this Government. . . . And it is conceived that a disallowed or abandoned claim would not be a bar to the subsequent acquirement of rights under the act of Congress by another claimant.”

Mr. Bayard, Sec. of State, to Mr. Romero, Mex. minister, Feb. 18, 1886, MS Notes to Mexico, IX. 163.

One can not “lay a claim” to an island under the belief that it contains guano, but before any actual discovery of guano deposit, possession, or occupation.

Black, At.-Gen. (1859), 9 Op. 364.

To the question whether the United States would “give protection to an American citizen who has discovered and taken possession of a guano island while he was in command of a British vessel,” reply was made (1) that the act of 1856 required the person claiming the protection of the Government to show, among other things, that “possession was taken in the name of the United States;” (2) that “the discovery of an unoccupied island by the navigators of a ship, public or private, is generally understood to be for the benefit of the nation under whose flag the vessel sails, and under whose protection the crew, whatever may be their national origin, have for the time chosen to place themselves;” (3) that, “to recognize any other rule might introduce great uncertainty in the construction of an act which ought to admit of no doubt.” It was added, as an illustration of this uncertainty, that the captain, in the case put, “might desire to take possession in behalf of the United States, while his crew, owing allegiance to Great Britain, might well refuse to support such a pretension and leave him powerless to give any effect to his claim.”

Mr. Seward, Sec. of State, to Messrs. Kittredge & Proctor, May 9, 1866, 73 MS. Dom. Let. 57.

No claim, under the act of Congress, can have any earlier inception than the actual discovery of guano deposit, possession  
**Occupation.** taken, and actual occupation of the island, rock, or key whereon it is found.

Black, At.-Gen. (1859), 9 Op. 364.

“An actual taking of possession and actual occupation of the island whereon guano has been discovered are express conditions of the act of Congress, which are not complied with by a mere symbolical posses-

sion or occupancy, as by the planting of a flag, the erection of a tablet, an inscription, or other like acts.”

Black, At.-Gen. (1859), 9 Op. 364, 367. See also Mr. Black, Sec. of State, to Mr. Marshall, Dec. 28, 1860, *infra*.

The act of Congress makes it “a condition necessary to enable the discoverer to invoke the protection of this government, that he ‘shall take peaceable possession thereof and occupy’ the island, rock, or key. It is not for me to indicate the manner in which such occupation may be maintained against fresh discoverers, or in which they may be affected with notice of the prior claim. I could only suggest what ordinary prudence would recommend, that such measures should be taken as to leave no doubt that an actual occupation has been taken in good faith with the intention of making it continuous and permanent.”

Mr. Seward, Sec. of State, to Messrs. Kittredge & Proctor, May 9, 1866, 73 MS. Dom. Let. 57.

“Before any island can be declared as appertaining to the United States for the purposes specified in the Guano Act of 1856, proof must be furnished to the Department not only of the fact of its discovery, but also of its *actual, continuous and peaceable* occupation, by a citizen of the United States, accompanied with a reliable estimate of the quantity of guano on the island and an analysis of its quality under the certificate of some competent chemist.”

Mr. Black, Sec. of State, to Mr. Marshall, Dec. 28, 1860, 53 MS. Dom. Let. 336.

Upon the submission to the Department of State of sufficient proof of the fulfillment of the conditions prescribed by the statutes, the President “may, in his discretion, regard the island or islands containing the discovered deposits as appertaining to the United States, but he is not obliged to do so. The President may likewise nominate the bond, but in order to fix the penalty correctly and determine the sureties contemplated by the law, it is absolutely necessary that he should be fully informed as to the value of the deposit. . . . In former years it was the custom of the Department to issue a proclamation (which was delivered to the discoverer) after it had satisfied itself, as the law requires, in the matter of the discoverer’s proof and allegations, but this appears to have been discontinued for some time past.”

Mr. Gresham, Sec. of State, to Mr. Gordon, Oct. 19, 1893, 194 MS. Dom. Let. 57.

The discontinuance of the practice of issuing a proclamation, or certificate, to show that the conditions of the statute had been complied

with, and that the President, in the exercise of his discretion, "considered" the island "as appertaining to the United States," may perhaps be accounted for by the circumstance that, between the years 1869 and 1879, no islands were added to the list, with the result that, when new applications were made, the previous practice in such matters, having become unfamiliar, was not observed. The fact of the departure from the earlier practice, and the subsequent recognition of its adaptation to the requirements of the law, may be seen in the two following quotations:

"This Government does not grant protective rights to alleged discoverers of guano islands. It simply makes this Department the depository of such papers as discoverers may choose to place upon its files. The only action this Government can be expected to take, in the event of any of its citizens becoming embroiled in a controversy with citizens or subjects of a foreign Government with regard to ownership of guano deposits, is to use its diplomatic interference to redress the wrongs inflicted upon its citizens should they not in any manner have transgressed the laws of a foreign nationality."

Mr. Hunter, Acting Sec. of State, to Mr. Russell, July 3, 1880, 133 MS. Dom. Let. 491.

"From your letter of October 12th in reply to mine of the 3rd of the same month, both relating to certain islands included in a list, issued by your Department, of 'Guano Islands appertaining to the United States, bonded under the Act of August 18th, 1856,' it appears that the list was based upon bonds conditioned for lawful shipment and sale of guano from those islands, approved by this Department in the years 1880, 1881 and 1884, and filed in the office of the First Comptroller of the Treasury.

"A careful search of the files of this Department has been made for the purpose of ascertaining whether or not the President, in pursuance of the discretion vested in him by Section 5570 of the Revised Statutes, ever declared that these islands should 'be considered as appertaining to the United States.' No evidence can be found of such a declaration. Neither can there be found in this Department any explanation of the approval of such bonds. Their approval cannot, I think, be considered as an exercise of the President's discretion to consider the islands to which they relate as 'appertaining to the United States,' although your Department was naturally led by the circumstance of finding the bonds on file, to include the islands in the list mentioned.

"The Mexican Government insists that the islands are within its territory and lawful jurisdiction, and that under the terms of Section 5570, they never could have been 'considered as appertaining to the United States.' However this may be, it seems safe to say that they never have been so 'considered' within the meaning of that section.

"I may also add that the Department some time since addressed letters to persons who are shown by papers filed here to claim an interest in these islands, and so far as heard from, they are unable to produce any evidence showing that as to such islands the President has ever exercised the discretion vested in him by the guano islands Act.

"I have therefore to request that the islands

"viz: Arenas, Perez, Chica, Pajoras, and the Western Triangles, as well as Arenas Key, may be stricken from the list of guano islands appertaining to the United States."

Mr. Gresham, Sec. of State, to the Secretary of the Treasury, Nov. 17, 1894, 199 MS. Dom. Let. 437. Of the islands above mentioned, Arenas Key was added to the list in 1879; Arenas and the Western Triangles, in 1880; and Perez, Chica, and Pajoras, in 1884.

The certificate, commonly called a proclamation, originally issued by the Department of State to the alleged discoverer of a guano deposit, set forth the facts in regard to the discovery, occupation, and bonding, under the act of 1856, and then declared that the discoverer, or his assignee, as the case might be, was "entitled, in respect to the guano on the said island, to all the privileges and advantages intended by that act to be secured to citizens of the United States who may have discovered deposits of guano,—provided, always, that the said [name of discoverer, or assignee] shall abide by the conditions and requirements imposed by the act of Congress aforesaid." It was then attested by the Secretary of State under the seal of the Department.

53 MS. Dom. Let. 3; id. 447.

See, also, *Jones v. United States* (1890), 137 U. S. 202.

The effect of this certificate was to confer on the discoverer and his assigns the rights given by the statute to those who fulfilled its conditions.

Mr. Evarts, Sec. of State, to Mr. Russell, April 5, 1878, 122 MS. Dom. Let. 384, referring to a certificate issued by the Department of State, in December, 1868.

"It is not competent for this Department to guarantee the title of the alleged discoverer." (Mr. Day, Assist. Sec. of State, to Mr. Chambers, Sept. 27, 1897, 221 MS. Dom. Let. 203.)

"The power, conferred on the President of the United States by section 1 of the act of Congress of 1856, to determine that a guano island shall be considered as appertaining to the United States, being a strictly executive power, affecting foreign relations, and the manner in which his determination shall be made known not having been prescribed by statute, there can be no doubt that it may be declared through the Department of State, whose acts in this regard are in legal contemplation the acts of the President. *Wolsey v. Chapman*,

101 U. S. 755, 770; *Runkle v. United States*, 122 U. S. 543, 557; 11 Opinions of Attorneys General, 397, 399."

*Jones v. United States* (1890), 137 U. S. 202, 217.

The foregoing passage related to a certificate or proclamation, the text of which is given in the opinion, issued by the Department of State in the case of Navassa Island.

It is not the practice of the Department to vouch for the legality of mortgages and assignments in respect of guano islands. It merely places them on file as requested, and, having no means of assurance that they constitute a complete record even as they stand, declines to recount them to inquirers, though they are open to inspection by authorized persons.

Mr. Gresham, Sec. of State, to Mr. Gordon, Oct. 19, 1893, 194 MS. Dom. Let. 57.

It is not the practice of the Department of State to furnish certified copies of papers relating to guano island claims, except to the legal holder of the claim or his duly authorized representative.

Mr. Brown, Chief Clerk, to Mr. Neymann, Jan. 24, 1879, 126 MS. Dom. Let. 230.

"The act of Congress of August 18, 1856, authorizes the President, after certain prerequisites have been performed, to determine that islands upon which guano deposits have been discovered, appertain to the United States. It is only after this preliminary decision has been made that it becomes necessary to determine whether the discoverers may have exclusive possession of the islands for the purpose of taking off the guano and selling it; and the bond and securities provided for in the second section of the act are not required except with reference to the exclusive possession."

**The bond.**

Mr. Cass, Sec. of State, to Messrs. Wood and Grant, July 1, 1857, 47 MS. Dom. Let. 165.

The bond is to be given by the discoverer, or his assigns; but, in determining the proper party to give the bond required by the act of Congress, the political department of the Government can only look to the party complying with the conditions of the statute, without considering the legal or equitable rights of other parties to share in the profits of the speculation, the determination of which rights belongs to the judicial tribunals.

9 Op. 364, Black, 1859.

It appears that by a general regulation of the Department of State, in force in 1869, the penalty of such a bond was fixed at \$50,000. (Mr. Seward, Sec. of State, to Mr. Tayler, Feb. 15, 1869, 80 MS. Dom. Let. 297.)

The guano island bonds are kept in the Treasury Department. (Mr. Uhl, Acting Sec. of State, to the Sec. of the Treasury, Dec. 20, 1894, 200 MS. Dom. Let. 41. See Mr. Gresham, Sec. of State, to the Sec. of the Treasury, Dec. 5, 1894, 199 MS. Dom. Let. 589.)

The sureties on a guano island bond having asked to be released from their obligation, on the ground that the conditions of the bond had been violated by their principal, and that they had no power to restrain him from committing further breaches, it was advised that the President possessed, under the statute, no authority to grant the request.

11 Op. 30, Bates, 1863.

The breach, by a discoverer or his assignee, of the conditions of his bond affects "the private rights only of the delinquent," and does "not impair the dominion of the United States or the jurisdiction of their courts."

*Jones v. United States* (1890), 137 U. S. 202, 224. On the contrary, as was shown in the case of Arenas, Chica, and other islands, *supra*, "the bonds can not be relied upon as showing that the islands to which they severally relate are 'considered as appertaining to the United States.'" (Mr. Uhl, Acting Sec. of State, to the Sec. of the Treasury, Dec. 20, 1894, 200 MS. Dom. Let. 41.)

### (3) RIGHTS OF THE DISCOVERER.

#### § 114.

The discoverer, when the terms of the statute have been fulfilled, acquires for himself and assigns, "*during the pleasure of Congress*, the exclusive right of working and disposing of the guano," subject to the conditions and limitations prescribed by law.

Mr. Evarts, Sec. of State, to Mr. Russell, April 5, 1878, 122 MS. Dom. Let. 384.

"The right conferred by the United States, under the guano islands act of August 18, 1856, c. 164 (Rev. Stat., tit. 72), upon the discoverer of a deposit of guano and his assigns, to occupy, at the pleasure of Congress, for the purpose of removing the guano, an island determined by the President to appertain to the United States, is not such an estate in land as to be subject to dower, notwithstanding the act of April 2, 1872, c. 81 (Rev. Stat., sec. 5572), extending the provisions of the act of 1856 'to the widow, heirs, executors or administrators of such discoverer' if he dies before fully complying with its provisions."

Syllabus, *Duncan v. Navassa Phosphate Co.* (1891), 137 U. S. 617.

"The pertinent sections of the Revised Statutes, 5570-78, appear to rest wholly on the American ownership of the rights granted. Sect. 5573, in particular, says, 'The discoverer or his assigns, *being citizens of the United States*,' etc. The bond given is under section 5574, and engages that the guano shall be delivered only to citizens of the United States for use in the United States; but that section has been several times suspended, and is now under suspension for five years from the date of the act of Congress approved April 18, 1884. This suspension

permits the export of the guano to any foreign country, or on account of aliens; but it clearly does not suspend the precedent condition of American ownership of the grant from which the right to export is derived, and upon which the exercise of protection and jurisdiction on the part of the United States depends. Hence, a case arising, I should deem that the assignment of a guano grant to an alien owner would annul the relation which the Government of the United States holds under the existing statutes."

Mr. Bayard, Sec. of State, to Mr. Parrott, May 13, 1885, 155 MS. Dom. Let. 368.

"It is conceived that a disallowed or abandoned claim would not be a bar to the subsequent acquirement of rights under the act of Congress by another claimant."

Mr. Bayard, Sec. of State, to Mr. Romero, Mex. Minister, Feb. 18, 1886, MS. Notes to Mexico, IX. 163.

As to whether the nonuse of the privilege of working the guano causes a forfeiture thereof, "the law is silent upon the subject, and the Department has never prescribed any method of procedure in such case. Moreover, the Department has no power to adjudicate upon any conflict that may arise between parties, who are compelled to settle their differences before the legal tribunals of the country. The Department has never attempted to determine 'what constitutes abandonment of a guano island,' and it seems probable that this question should be decided by the courts, the case arising." The same reply may be made to the question whether an island "once entered, and forfeited or abandoned by original discoverer, or his assigns," may be entered upon and worked by other parties, not claiming under the original grantee. If it be admitted that failure to work the deposit causes a forfeiture of the right, the Department of State, "in the absence of any specific provision of law affecting this question, . . . must decline to fix a limit of time as a precedent."

Mr. Gresham, Sec. of State, to Mr. Gordon, Oct. 19, 1893, 194 MS. Dom. Let. 57.

The Department has no power to determine disputes between citizens of the United States in respect of their rights in a guano island, "and the claimants must vindicate their title before the legal tribunals of the country."

Mr. Fish, Sec. of State, to Mrs. Stevens, June 21, 1869, 81 MS. Dom. Let. 289;  
Mr. J. C. B. Davis, Acting Sec. of State, to Mr. Gray, Aug. 21, 1869, id. 570;  
Mr. Gresham, Sec. of State, to Mr. Gordon, Oct. 19, 1893, 194 id. 57.

#### (4) LISTS OF ISLANDS.

#### § 115.

Two formal lists of guano islands appear to have been made in the Treasury Department. The first one was annexed to a circular of



Mr. McCulloch, Secretary of the Treasury, to collectors of customs, of February 12, 1869, in which it was described as a "corrected list," based upon "the bonds and papers, transmitted from the Department of State, now on file in the office of the First Comptroller of the Treasury." The second, which was reported by the First Comptroller to the Secretary of the Treasury, Dec. 22, 1885, was based upon the bonds in his office, and included the islands which had been bonded since 1869. A copy of it was sent to the Secretary of State July 3, 1890. Another copy was communicated by the First Comptroller to the Assistant Secretary of the Treasury, Sept. 16, 1893.<sup>1</sup> Reduced to one alphabetical list, the islands that have been bonded are as follows:

Name.	Latitude.	Longitude.	Number and date of bond.
Alacrans Islands, viz, Perez Island, Chica Island, and Pajoras Island.	22 25 00 N.	89 40 00 W.	No. 16, June 21, 1884.
America Islands.....	3 40 00 N.	159 28 00 W.	No. 9, Feb. 8, 1860.
Anne's.....	9 49 00 S.	151 15 00 W.	Do.
Arenas.....	22 24 30 N.	91 24 30 W.	No. 15, Oct. 18, 1880.
Arenas Key.....	22 7 10 N.	91 24 30 W.	No. 13, Sept. 8, 1879.
Baker's, or Nantucket, or New Nantucket.....	0 15 00 N.	176 30 00 W.	No. 1, Oct. 28, 1856.
Barber's.....	8 54 00 N.	178 00 00 W.	No. 9, Feb. 8, 1860.
Barren or Starve.....	5 40 00 S.	155 55 00 W.	No. 6, Dec. 27, 1859.
Bauman's.....	11 48 00 S.	154 10 00 W.	No. 9, Feb. 8, 1860.
Beacon Key. (See Serrannilla Keys.)			
Birmies'.....	3 35 00 S.	171 39 00 W.	Do.
Caroline.....	9 54 00 S.	150 07 00 W.	Do.
Chica. (See Alacrans Islands.)			
Christmas.....	1 58 00 N.	157 10 00 W.	No. 7, Dec. 29, 1859.
Clarence.....	9 07 00 S.	171 40 00 W.	No. 9, Feb. 8, 1860.
Dangerous Islands.....	10 00 00 S.	165 56 00 W.	Do.
Dangers Rock.....	6 30 00 N.	162 23 00 W.	Do.
David's.....	0 40 00 N.	170 10 00 W.	Do.
De Anes.....	15 40 00 N.	63 37 00 W.	No. 14, Sept. 13, 1880.
Duke of York.....	8 30 00 S.	172 10 00 W.	No. 9, Feb. 8, 1860.
East Key. (See Serrannilla Keys.)			
Enderbury.....	3 08 00 S.	171 08 00 W.	No. 6, Dec. 27, 1859.
Enderburys.....	3 08 00 S.	174 14 00 W.	No. 9, Feb. 8, 1860.
Farmer's.....	3 00 00 S.	170 50 00 W.	Do.
Favorite.....	2 50 00 S.	176 40 00 W.	Do.
Flint.....	10 32 00 S.	162 05 00 W.	Do.
Flint's.....	11 26 00 S.	151 48 00 W.	Do.
Frances.....	9 58 00 S.	161 40 00 W.	Do.
Frienhaven.....	10 00 00 S.	156 59 00 W.	Do.
Gallego.....	1 42 00 N.	104 05 00 W.	Do.
Ganges.....	10 59 00 S.	160 55 00 W.	Do.
Gardners.....	4 40 00 S.	174 52 00 W.	Do.
Great Swan. (See Swan Islands.)			
Groninque.....	10 00 00 S.	156 44 00 W.	Do.
Hero. (See Starbuck.)			
Howland, or Nowlands.....	0 52 00 N.	176 52 00 W.	No. 4, Dec. 3, 1858.
Humphrey's.....	10 40 00 S.	160 52 00 W.	No. 9, Feb. 8, 1860.
Islands in Caribbean Sea. Not named.....			No. 11, Aug. 12, 1868.

<sup>1</sup>See Magoon's Report, 52.

Name.	Latitude.	Longitude.	Number and date of bond.
Jarvis.....	0 21 00 S.	159 52 00 W.	No. 2, Oct. 28, 1856.
Johnson's Islands.....			No. 5, Sept. 6, 1859.
Kemn's.....	4 41 00 S.	173 44 00 W.	No. 9, Feb. 8, 1860.
Lluderons.....	11 05 00 S.	161 50 00 W.	Do.
Little Swan. (See Swan Islands.)			
Low Islands.....	9 33 00 S.	170 38 00 W.	Do.
Mackin (or Makin).....	3 02 00 N.	172 46 00 W.	Do.
Malden's Islands.....	4 00 00 S.	155 00 00 W.	No. 8, Dec. 29, 1859.
Mary Letitia's.....	4 40 00 S.	173 20 00 W.	No. 9, Feb. 8, 1860.
Mary's.....	2 53 00 S.	172 00 00 W.	Do.
Mathews.....	2 03 00 N.	173 26 00 W.	Do.
McKean.....	3 35 00 S.	174 17 00 W.	No. 6, Dec. 27, 1859.
Middle Key. (See Serranilla Keys.)			
Morant Keys—Northeast Key, Sand Keys, Savanna Key, Seal Key.....	17 26 00 N.	77 55 00 W.	No. 13, Sept. 8, 1879.
Nantucket. (See Baker's.)			
Nassau.....	11 30 00 S.	165 30 00 W.	No. 9, Feb. 8, 1860.
Navassa.....	18 10 00 N.	75 00 00 W.	No. 3, Aug. 31, 1858.
New Nantucket. (See Baker's.)			
Northeast Key. (See Morant Keys.)			
Nowlands. (See Howland.)			
Pajoras. (See Alacrans Islands.)			
Palmyra.....	5 48 00 N.	162 20 00 W.	No. 9, Feb. 8, 1860.
Pedro Keys.....			No. 12, Nov. 22, 1869.
Penhuyn's.....	8 55 00 S.	158 07 00 W.	No. 9, Feb. 8, 1860.
Perez. (See Alacrans Islands.)			
Pescado.....	10 38 00 S.	159 20 00 W.	Do.
Petrel.....			No. 12, Nov. 22, 1869.
Phoenix.....	3 40 00 S.	170 52 00 W.	No. 9, Feb. 8, 1860.
Phenix.....	3 47 00 S.	170 55 00 W.	No. 6, Dec. 27, 1859.
Prospect.....	4 42 00 N.	161 38 00 W.	No. 9, Feb. 8, 1860.
Quiros.....	10 32 00 S.	170 12 00 W.	Do.
Quito Sereno.....			No. 12, Nov. 22, 1869.
Rierson's.....	10 10 00 S.	160 53 00 W.	No. 9, Feb. 8, 1860.
Rogewein's Islands.....	11 00 00 S.	156 07 00 W.	Do.
Roncador.....			No. 12, Nov. 22, 1869.
Samarang Islands.....	5 10 00 N.	162 20 00 W.	No. 9, Feb. 8, 1860.
Sand Keys. (See Morant Keys.)			
Sarah Anne.....	4 00 00 N.	154 22 00 W.	Do.
Savanna Key. (See Morant Keys.)			
Seal Key. (See Morant Keys.)			
Serranilla Keys—East Key, Middle Key, Beacon Key.....	15 20 00 N.	79 40 00 W.	No. 13, Sept. 8, 1879. No. 14, Sept. 13, 1880.
Sidney's Islands.....	1 20 00 S.	171 00 00 W.	No. 9, Feb. 8, 1860.
Starbuck or Hero.....	5 25 00 S.	155 56 00 W.	Do.
Starve. (See Barren.)			
Stuvers.....	10 05 00 S.	152 16 00 W.	Do.
Swan Islands, Great and Little, in the Caribbean Sea.....			No. 10, Dec. 30, 1862.
Uahuga. (See Washington.)			
Walkers.....	3 58 00 N.	149 10 00 W.	No. 9, Feb. 8, 1860.
Washington or Uahuga.....	4 40 00 N.	160 07 00 W.	Do.
Western Triangles.....	20 54 00 N.	92 13 00 W.	No. 14, Sept. 13, 1880.

Nov. 21, 1894, Mr. Wike, Assistant Secretary of the Treasury, sent out the following circular:

“To Collectors of Customs and Others:

“At the request of the Secretary of State, the following-named ‘Guano Islands,’ specified in lists issued by this Department of Guano Islands appertaining to the United States, will be considered as stricken from said list, and no longer included among the Guano Islands bonded by the United States under the Act of August 18, 1856, viz:

“Arenas,	Pajoras,	Arenas Key,
“Perez,	Chica,	Western Triangles.”

The letter of the Secretary of State, dated Nov. 17, 1894, and conveying the request mentioned in the foregoing circular, is given, *supra*, § 113. Nov. 28, 1894, the Secretary of the Treasury sent a list of the bonded islands to the Department of State, and asked that it be further revised, so as to include only islands which were then “considered as appertaining to the United States.” The Department replied that this would require the passing on the rights of a large number of private persons, and that it was preferred not to do it unless their action should render it necessary.

Mr. Gresham, Sec. of State, to the Sec. of the Treasury, Jan. 14, 1895, 200 MS. Dom. Let. 254.

The following information, collected in the Department of State and elsewhere, touching alleged guano islands, embraces islands that have not been, as well as those that have been, considered as appertaining to the United States. By “discoverer” is meant the person by whom the claim of discovery of a guano deposit was made, without regard to the question whether the claim was well founded.

*Agnes Island*.—Discoverer, William H. Parker, who also gave bond. (Mr. Payson, Third Assist. Sec. of State, to Messrs. McDaniel and Souther, May 26, 1880, 133 MS. Dom. Let. 132.)

As to certain assignments, see Mr. Payson, Third Assist. Sec. of State, to Mr. Granger, May 28, 1880, 133 MS. Dom. Let. 157.

Mr. Fish declared that the Department had “exhausted all its powers in relation to the islands in question [Agnes and Johnson’s], the history of the conflicting claims to which may be found in an opinion of the Attorney-General, dated July 9, 1859.” The Department would strictly confine itself to an expression of its willingness to put on file any respectful paper that might be offered, leaving the effect of it to be determined by the courts. (Mr. Fish, Sec. of State, to Mr. Samson, April 12, 1870, 84 MS. Dom. Let. 153.)

Copies of all papers in the Department relating to Agnes and Johnson islands would cost \$85. (Mr. Rives, Assistant Sec. of State, to Mr. Patterson, April 19, 1888, 168 MS. Dom. Let. 144.)

*Alacranes Keys*, embracing Perez, Chica, and Pajoras.—Discoverer, James W. Jennett, February, 1879; declaration, Sept. 1, 1879; bonded, June 21, 1884. As appears above, they have been stricken from the list. (Mr. Gresham, Sec. of State, to Treasury, Oct. 19, 1893, 194 MS. Dom. Let. 57; Mr. Uhl, Acting Sec. of State, to Treasury, Oct. 3, 1894, 199 *id.* 49; Mr. Uhl, Acting Sec. of State, to Mr. Brash, Oct. 15, 1894, *id.* 147; Mr. Uhl,

Acting Sec. of State, to Mr. Wilbur, Oct. 15, 1894, *ibid.*; Mr. Gresham, Sec. of State, to Treasury, Nov. 17, 1894, 199 MS. Dom. Let. 437; Mr. Cridler, 3rd Assist. Sec. of State, to Mr. Altman, Aug. 8, 1899, 239 *id.* 197.)

*Alta Vela*.—The Department of State declined to recognize the claim of a certain firm, under the act of 1856. It seems that a right to the guano was at the same time claimed by another firm under a concession from the Dominican Government. (Mr. Fish, Sec. of State, to Messrs. Spofford et al., Sept. 10, 1869, 82 MS. Dom. Let. 55.) See S. Ex. Doc. 38, 40 Cong. 2 sess.; H. Mis. Doc. 10, 40 Cong. 3 sess. "St. Domingo had extended its jurisdiction over *Alta Vela*, incorporated it by name as a part of a province or political subdivision of the nation, and extended over it the laws of the Republic." (Mr. Fish, Sec. of State, to Mr. Preston, Dec. 31, 1872, MS. Notes to Hayti, I. 124, 144.)

*Arcas Island, or Key*.—Conflicting claims of discovery were made by Jas. W. Jennett and Pascal A. Quinan. (Mr. Hay, Assist. Sec. of State, to Mr. Long, Dec. 11, 1879, and to Mr. Wallis, same date, 131 MS. Dom. Let. 17; Mr. Porter, Acting Sec. of State, to Mr. Buckley, Feb. 5, 1886, 158 MS. Dom. Let. 651.) It was stated in 1887 that no controversy had arisen with Mexico in regard to the island. (Mr. Porter, Assist. Sec. of State, to Mr. Shelley, July 23, 1887, 164 MS. Dom. Let. 677.) Subsequently, however, it was stated that Mexico claimed the *Arcas Cays* as part of the *Arenas Group*. (Mr. Cridler, Third Assist. Sec. of State, to Mr. Southard, Feb. 26, 1900, 243 MS. Dom. Let. 226. This letter contains the following statement: "The *Arcas Cay* do not appear in the 'list of guano islands appertaining to the United States bonded under the act of August 18, 1856, as appears from bonds on file in the office of the Comptroller of the Treasury;' but an affidavit of discovery was filed in this Department. . . . I can not find that the Department ever made any representations to the Mexican Government on the subject of the *Arcas Cays*. It can not therefore be said that this Government has either recognized or disputed the Mexican claim.") See S. Ex. Doc. 151, 52 Cong. 1 sess. It was stated in 1897 that no assignments of interest in the island had been made since the issuance of that document. (Mr. Day, Assist. Sec. of State, to Mr. Money, Sept. 27, 1897, 221 MS. Dom. Let. 208.)

*Arenas, and Arenas Key*.—*Arenas Key*: Discoverer, James W. Jennett; bonded, Sept. 8, 1879; assignments of interest made in the same year. (129 MS. Dom. Let. 296; 130 *id.* 92.) *Arenas*: Conflicting claims of discovery by Jas. W. Jennett and John G. Wallis (194 MS. Dom. Let. 57); bonded Oct. 18, 1880.

The American occupants having been removed by the Mexican Government from *Arenas Key*, as trespassers, the Department of State was "not . . . able to reach the conclusion that this island was, if at all, sufficiently derelict to warrant a demand for reparation from that Government." (Mr. Frelinghuysen, Sec. of State, to Mr. Brewer, M. C., June 15, 1882, 142 MS. Dom. Let. 411.) The Mexican legation was advised of this opinion. (Mr. Frelinghuysen, Sec. of State, to the Mex. minister, June 29, 1882, enclosing a copy of the letter to Mr. Brewer. MS. Notes to Mex. Leg. VIII. 343.) This opinion was reaffirmed (Mr. Bayard, Sec. of State, to Mr. Everhart, March 10, 1885, 154 MS. Dom. Let. 421); but the Department afterwards declined to comply with the request of the Mexican minister, made with reference to a suit which his Government proposed to institute in the United States courts against certain American vessels for removing guano from *Arenas Key*, to strike the island from the list, notify the port authorities, and cancel the bonds of the alleged discoverers,

the Department saying that, assuming the matter to be one of judicial cognizance, the question whether the defendants had title would be "for decision by the court . . . after hearing the evidence on both sides," and that if, on the trial, evidence of the action of the Department was needed, it could be obtained in the ordinary way by calling for certified copies of the records. (Mr. Porter, Acting Sec. of State, to Mr. Romero, Mex. min., Jan. 18, 1886, MS. Notes to Mex. IX. 145.) On another occasion it was said that the letter of Mr. Frelinghuysen to Mr. Brewer "left the question of title open," but that the recent correspondence would be sent to the Secretary of the Treasury "to the end that his Department may adopt such course as it thinks best concerning the omission of Arenas Island from the list of guano islands." (Mr. Adee, Acting Sec. of State, to Mr. Romero, Jan. 30, 1886, MS. Notes to Mexico, IX. 152; Mr. Adee, Acting Sec. of State, to Mr. Manning, Jan. 30, 1886, 158 MS. Dom. Let. 597.) Subsequently, however, the Mexican minister was invited to submit further proofs of jurisdiction (Mr. Bayard, Sec. of State, to Mr. Romero, Feb. 18, 1886, MS. Notes to Mexico, IX. 163); and it was stated that there was nothing to show that the Mexican claim "had ever been controverted by the United States." (Mr. Bayard, Sec. of State, to Mr. Fisher, Feb. 26, 1886, 159 MS. Dom. Let. 173.) April 23 and June 21, 1886, Mr. Romero, Mexican minister, filed various historical proofs of the title of Spain and of the rights of Mexico as her successor. (Mr. Bayard, Sec. of State, to Mr. Manning, June 30, 1886, 160 MS. Dom. Let. 616.) These proofs were such that the United States "practically acquiesced in the Mexican claim of jurisdiction." (Mr. Wharton, Assist. Sec. of State, to Mr. Brewer, March 22, 1890, 177 MS. Dom. Let. 243.) At length, after full consideration, the islands were, on the request of the Secretary of State, stricken from the list. (Mr. Uhl, Acting Sec. of State, to Treasury, Oct. 3, 1894, 199 MS. Dom. Let. 49; Mr. Uhl, Acting Sec. of State, to Mr. Graybill, Oct. 15, 1894, id. 147; to Mr. Gatchell, Oct. 16, 1894, id. 157; Mr. Gresham, Sec. of State, to Treasury, Nov. 17, 1894, id. 437.)

*Aves (or Bird) Island.*—Citizens of the United States discovered guano on one of these islands in 1854 and took possession of it. This was prior to the Guano Islands act. The Venezuelan Government, under a claim of sovereignty, expelled them and broke up their business. The United States, understanding that the islands, when occupied by its citizens, "were not embraced within the sovereignty of any power, but were derelict," presented to Venezuela a claim for damages "for molesting them [the occupants] and breaking up their business." (Mr. Marcy, Sec. of State, to Mr. Fames, minister to Venezuela, Jan. 24, 1855, S. Ex. Doc. 25, 34 Cong. 3 sess. 4.) The dispute was settled by a convention signed by the United States minister to Venezuela and the Venezuelan secretary of foreign relations, Jan. 14, 1859, Venezuela agreeing to pay \$130,000 to indemnify the claimants for their losses, and the United States engaging to make no further claim to the islands. (S. Ex. Doc. 10, 36 Cong. 2 sess. 458, 460, 470, 472. The case of the claimants is set forth in S. Ex. Doc. 25, 34 Cong. 3 sess. 35 et seq.; of Venezuela, in S. Ex. Doc. 10, 36 Cong. 2 sess. 287-371, 397-420. See, also, Lawrence's Wheaton (1863), 319, 320; Davis's Notes, Treaty Vol. (1776-1887), 1403; a pamphlet entitled "The Aves Island case, with the correspondence relative thereto, and discussion on law and facts: H. S. Sanford, attorney for claimants, Washington, 1861;" also, Mr. Seward, Sec. of State, to Mr. Culver, Jan. 24, 1863, MS. Inet. Venezuela, I. 259; Mr. Fish, Sec. of State, to Mr. Partridge, Dec. 7, 1869,

id. II. 147). June 30, 1865, the Queen of Spain, as arbitrator in a dispute between the Netherlands and Venezuela as to sovereignty over the islands, rendered an award in favor of Venezuela. (Int. Arbitrations, V. 5037; Seijas, *El Derecho Internacional Hispano-Americano*, IV. 210.)

*Baker's Island*, also called *Nantucket* and *New Nantucket*.—Michael Baker claimed to have discovered the island in 1832. He visited it in 1839, landing and finding guano and taking possession "under the flag of the United States." He revisited it in 1844, 1845, and 1851. (Mr. Black, Sec. of State, to Mr. Marshall, Dec. 28, 1860, 53 MS. Dom. Let. 336.) June 7, 1858, a committee of the House of Representatives made an unfavorable report on the quality of the guano. (H. Report 307, 35 Cong. 1 sess.; S. Ex. Doc. 11, 35 Cong. 1 sess.) March 2, 1861, Mr. Black, Sec. of State, issued a certificate reciting that the American Guano Company, of New York, having acquired Baker's rights, and complied with the act of 1856, was entitled to the privileges thereof. (53 MS. Dom. Let. 447.) The Department of State, in 1870, was unable to say whether the island was "in the possession of the United States Guano Company," or whether it was "unoccupied and vacant." (Mr. Fish, Sec. of State, to Mr. Young, March 10, 1870, 83 MS. Dom. Let. 447.) "These islands [Baker and Howland] are now, it is believed, occupied by employees of guano companies belonging to citizens of the United States, who ship the deposits found thereon to this country and elsewhere." (Mr. Cridler, 3d Assist. Sec. of State, to Miss Lewis, May 7, 1898, 228 MS. Dom. Let. 320.)

*Booby Key*.—Conflicting claims of discovery by J. W. Jennett and P. A. Quinan. Jennett claimed discovery May 8, 1868, and assigned his interest May 17, 1876. A declaration of discovery, on behalf of Quinan, was filed by L. M. Simpson, Dec. 4, 1886. (Mr. Adee, Second Assist. Sec. of State, to Mr. Long, Nov. 18, 1887, 166 MS. Dom. Let. 179.) The island is in lat. 14° 14' N., long. 80° 30' W.

*Cayo Verde*.—Discoverer, J. W. Kendall, of Baltimore. As jurisdiction over the island was "distinctly asserted" by Great Britain, Attorney-General Black advised that the President had "no right under the law to annex the island to the United States, or to put any American citizen in possession of it, until the diplomatic question raised by the British minister shall be finally settled, and not then unless it be settled in our favor." (9 Op. 406 (1859).) The President, therefore, declined "to take any measures by which the said island would be considered as appertaining to the United States." (Mr. Cass, Sec. of State, to Mr. Brent, March 19, 1860, 52 MS. Dom. Let. 49.) "As to Cayo Verde, both occupancy and jurisdiction were shown to have been exercised on that island by the local authorities of Jamaica long previous to the discovery of guano on it by citizens of the United States." (Mr. Fish, Sec. of State, to Mr. Preston, June 10, 1873, MS. Notes to Hayti, I. 153, 161; cited by J. Hubley Ashton, esquire, counsel for the United States, in his brief in the case of *Gowen & Copeland v. Venezuela*, No. 16, U. S. and Venezuelan Commission, 1889–1890. See, also, Sen. Report 280, 36 Cong. 1 sess.; Mr. Hay, Sec. of State, to Mr. Wheeler, April 7, 1900, 244 MS. Dom. Let. 230.)

*Chica Island*.—See *Alacrans Keys*, *supra*.

*Christmas Island*.—Discoverer, Captain John Stetson, of New Haven, Conn., prior to 1857; possession taken June 20, 1858, by Capt. J. L. Pendleton, of the ship *John Marshall*, in behalf of A. G. Benson and associates, under a deed from Stetson dated May 11, 1857. A. G. Benson executed May 13,

1857, an assignment of all interests to G. W. Benson, who, Nov. 24, 1858, in turn conveyed them to the United States Guano Co., of New York, which furnished an approved bond under the statutes. In 1865 a license was granted by the British authorities to Dr. Crowther, of Tasmania, to enable him to export guano from Christmas and two other islands, but, as it proved to be unprofitable, his license was canceled in 1869 at his own request. June 9, 1871, a new license was granted to Mr. Alfred Houlder for nine years. His representative, on arriving there July 5, 1872, found that the island had lately been taken possession of by the U. S. ship *Narragansett*, and that it was then occupied by three men in the employ of C. A. Williams, of Honolulu. Under the circumstances, Mr. Houlder had his license canceled, but, having learned that Mr. Williams had given up occupation, he applied for a renewal of it. Before acting on this application, the British Government, in order to avoid any question as to the right of sovereignty over the island, inquired whether the United States had finally abandoned its claim to it. The Department of State, referring to the papers on which rested the company's title, and observing that "no notification" had been received that the company had "abandoned" the island, said: "They [the company] are still considered to be entitled to the protection guaranteed by the laws of the United States, in their possessory right, so far as such occupation may be necessary to secure to the company, or its assigns, the deposits of guano found thereon." (Mr. Evarts, Sec. of State, to Sir Edward Thornton, April 1, 1879, MS. Notes to Gr. Br. XVIII. 18; For. Rel. 1888, I. 712, 713.) In 1888 the United States, on learning that Sir William Wiseman, H. B. M. S. *Caroline*, had taken possession of Christmas, Fanning, and Penryhn islands, on behalf of his Government, recalled the correspondence of 1879 in relation to Christmas Island, and reserved all questions that might grow out of the occupation. (Mr. Bayard, Sec. of State, to Mr. White, chargé at London, April 30, 1888, For. Rel. 1888, I. 712.) Lord Salisbury in reply maintained that the island had in fact been abandoned by the American company prior to April, 1882, when certain British subjects, of Auckland, finding it unoccupied, took possession and hoisted the British flag; that they afterwards continued in possession; and that Sir W. Wiseman did not take formal possession till he had "satisfied himself that there was no evidence on the spot of the island being still claimed by the United States or that it was occupied by United States citizens." (Lord Salisbury to Mr. White, chargé at London, May 24, 1888, For. Rel. 1888, I. 727-728.)

*Clipperton Island.*—An interest was claimed in the island by the Oceanic Phosphate Company, by assignment from one Frederick W. Parmien. Parmien at one time claimed to have taken possession of the island for the Stonington Phosphate Co., and at another to have taken possession for himself and certain other persons. The Oceanic Phosphate Co. was dispossessed by the Mexican authorities. The island was not bonded, nor was it in the list of guano islands appertaining to the United States. According to Lippincott's Gazetteer, it is claimed by France. (Mr. Adee, Acting Sec. of State, to Mr. Chapman, Sept. 22, 1893, 193 MS. Dom. Let. 489. See, also, for a review of the facts, Mr. Adee, Acting Sec. of State, to Mr. Thomas, Aug. 13, 1895, 204 MS. Dom. Let. 100.) It was stated by the French Ambassador, Jan. 6, 1898, that his Government claimed the island not only on the ground of discovery by a French captain in 1709, but also on that of the taking of formal possession by a French naval officer

sent out for the purpose in 1858. (Mr. Sherman, Sec. of State, to Mr. Perkins, Jan. 27, 1898, 225 MS. Dom. Let. 17.) June 28, 1898, the Department of State, in response to a request of the French embassy for its views as to the action of the Mexican authorities in refusing to permit an American company to remove guano from the island, stated that if the inquiry related to the case of the Oceanic Phosphate Company, it had been held that, as the company had not complied with the conditions prescribed by sections 5570-5578 of the Revised Statutes, its protest against the action of the Mexican authorities could not be supported. (MS. Notes to France, X. 509.)

*Fanning Island.*—See For. Rel. 1888, I. 712, 727-728.

*For Islands.*—By a letter of May 1, 1899, a claim to three islands, known as the Fox Islands, situated in lat. 50° 58' 15" N. and long. 58° 41' 45" W., to lat. 50° 58' 15" N. and long. 58° 45' 22" W., was filed in the Department of State, on the part of William J. Hewitt, Nelson A. Hewitt, and William F. Lunt, all of Newburyport, Mass., as discoverers, who gave notice of their intention to take possession of the islands in the name of the United States on account of guano deposits, and requested advice as to the course they should pursue. They were duly informed as to the steps necessary to be taken under the statutes relating to guano islands. (Mr. Hay, Sec. of State, to Mr. Lunt, May 26, 1899, 237 MS. Dom. Let. 265.)

*Galapagos Islands.*—See, as to an alleged discovery of guano by Mr. Brissot, Mr. Marcy, Sec. of State, to Mr. White, Aug. 14, 1854, MS. Inst. Ecuador, I. 54.

*Howland (or Nowland's) Island.*—Discoverer, Geo. E. Netcher, 1842, 1848; possession taken in May, 1857. (Mr. Appleton, Assist. Sec. of State, to Mr. Benson, Nov. 11, 1858, 49 MS. Dom. Let. 349; Mr. Cridler, 3rd Assist. Sec. of State, to Miss Lewis, May 7, 1898, 228 MS. Dom. Let. 320.) The American Guano Co. having requested the revocation of a certificate of the Department of State, signed by the Acting Secretary of State, Aug. 7, 1860, declaring the United States Guano Company of New York to be entitled to the guano on the island, the Attorney-General advised that the Secretary of State had "no authority to comply with the request, or to issue a new proclamation or certificate on behalf of the American Guano Company," but that the latter company must proceed judicially against the rival claimant. (Mr. Seward, Sec. of State, to Mr. Marshall, Nov. 14, 1865, 71 MS. Dom. Let. 119.)

*Jarvis Island.*—Discoverer, Michael Baker, 1835. (See H. Report 307, 35 Cong. 1 sess., as to the quality of the guano.) Discovery at subsequent times alleged by various persons, including one Lucas. (Mr. Black, Sec. of State, to Mr. Marshall, Dec. 28, 1860, 53 MS. Dom. Let. 336.) The island was visited in 1858 by the U. S. S. *St. Mary's*, Captain Davis, who took formal possession in the name of the United States. (S. Ex. Doc. 11, 35 Cong. 1 sess.) Mr. Black, Secretary of State, issued a certificate to the American Guano Company of New York as assignee of Baker, March 2, 1861. (53 MS. Dom. Let. 447.) "Her Majesty's ship *Cormorant*, in 1889, took possession of Jarvis which now figures on all maps as a British island, and is even so charted by our own Hydrographic Office. Yet as recently as Sept. 16, 1893, the island was officially reported as 'appertaining to the United States' in a list of our guano islands furnished by the First Comptroller of the Treasury to the Hon. Scott Wike, Assistant Secretary of the Treasury." (N. Y. Sun, Nov. 16, 1900, editorial entitled "The Present Status of the Guano Isles.")



*Johnson's Islands.*—The circumstances of the discovery and taking possession of Johnson and Agnes islands, which lie in the Pacific Ocean, in lat. 16° 46' N. and long. 169° 17' W., are fully detailed in an opinion of Attorney-General Black, in 1859. (9 Op. 364.) The discoverer was William H. Parker, who also gave bond. (Mr. Payson, Third Assist. Sec. of State, to Messrs. McDaniel and Souther, May 26, 1880, 133 MS. Dom. Let. 132.) See, as to the proposed transfer of interests to an alien company, Mr. Bayard, Sec. of State, to Mr. Parrott, May 13, 1885, *supra*, under "Rights of the discoverer and his assigns." See, also, Agnes Island, *supra*. It seems that Johnson Island was formally annexed to Great Britain by H. B. M. S. *Champion* in 1892, and that no representations were made to the British Government on the subject at the time. (Mr. Hay, Sec. of State, to the Sec. of the Navy, Feb. 17, 1899, 235 MS. Dom. Let. 44.)

*Lobos Islands.*—These islands were visited in 1822 by Captain Morrell, an American navigator, who published in 1832 an account of his discovery of guano there. They lie from twenty to thirty miles from the coast of Peru. In a controversy with the government of that country in 1852, as to jurisdiction over them, Mr. Webster argued that, as the ordinary jurisdiction of a nation extends only three marine miles from the shore, the islands could not be claimed by Peru on the simple ground of contiguity, and that her title must depend upon the answer made to the following question: "The Lobos Islands lying in the open ocean, so far from any continental possessions of Peru as not to belong to that country by the law of proximity or adjacent position, has the government of that country exercised such unequivocal acts of absolute sovereignty and ownership over them as to give to her a right to their exclusive possession, *as against the United States and their citizens*, by the law of undisputed possession?" (Mr. Webster, Sec. of State, to Mr. Osma, Peruvian Minister, Aug. 21, 1852, S. Ex. Doc. 109, 32 Cong. 1 sess. 12. See, also, Mr. Webster, Sec. of State, to Mr. Clay, Aug. 30, 1852, S. Rep. 397, 34 Cong. 3 sess. 57; Curtis' Life of Webster, II. 652.) A despatch of Mr. J. Randolph Clay, United States minister at Lima, of June 24, 1852, conveying information as to Peru's title, caused the countermanding of the order which had previously been given to the American naval forces to protect vessels in taking cargoes from the islands. (Mr. Conrad, Acting Sec. of State, to Mr. Clay, Sept. 21, 1852, S. Rep. 397, 34 Cong. 3 sess. 59.) A full report was made by Mr. Clay, Oct. 25, 1852, showing the long-continued exercise of jurisdiction by Peru (S. Rep. 397, 34 Cong. 3 sess. 106-164); and the United States afterwards withdrew "unreservedly" all objections to Peru's title. (Mr. Everett, Sec. of State, to Mr. Osma, Nov. 16, 1852, S. Rep. 397, 34 Cong. 3 sess. 169, 172. Annexed to this report, and printed as part of it (pp. 27-283), is a message of President Pierce to the Senate of April 29, 1856, which was not printed at that time.) As to the claims of Mr. A. G. Benson, growing out of the transaction, see the report of Mr. Wade, from the Committee of Claims, Feb. 18, 1857, S. Rep. 397, 34 Cong. 3 sess.; and Int. Arbitrations, III. 2390-2396. The restrictions of Peru on the sale of guano are discussed in H. Ex. Doc. 70, 33 Cong. 1 sess. They are also referred to in the cases of the "*Georgiana*" and "*Lizzie Thompson*," American vessels which were seized at the Chinca Islands. These cases, however, did not involve the question of title to those islands, but merely the right of Vivanco's adherents, as alleged *de facto* authorities of Peru, to dispose of the guano. (Int. Arbitrations, II. 1593; S. Ex. Doc.

69, 35 Cong. 1 sess.; S. Ex. Doc. 25, 35 Cong. 2 sess.; Br. and For. State Papers, XXXI. 1097. See, also, report of Mr. Seward, Sec. of State, March, 30, 1861, MS. Report Book.)

*Malden Island.*—Discoverer, Geo. E. Netcher. His assignee, the United States Guano Co., furnished an approved bond. (Mr. Seward, Sec. of State, to Mr. Benson, April 30, 1866, 73 MS. Dom. Let. 3.)

*Marcus Island.*—In 1889 the Department of State received, through the American legation at Honolulu, a notice, signed by Andrew A. Rosehill, an American shipmaster, and affidavits of two witnesses, stating that he had on June 29, 1889, taken possession of and raised the American flag over this island, in lat. 24° 14' N. and long. 154° 0' E. The papers were acknowledged as "tending to show" a desire to make a claim under the Guano Island act, and attention was called to its conditions, including proof of previous nonoccupation and the giving of bond. The next evidences of claim were received in February, 1902, consisting of further affidavits, two of them made by the claimant, at Honolulu, June 22, 1899, and Jan. 20, 1902. The first alleged the taking possession in 1889 and previous nonoccupation. The second stated that affiant, besides posting on the island in 1889 a copy of his notice of occupation, built there a small native house, and, intending to return the next year, left behind with proper supplies a man and wife, who were taken off eleven months later by a passing vessel; that he was unable to revisit the island till 1895; that he again went ashore in 1896 and saw the evidences still there of his occupation in 1889, but owing to the weather was unable to anchor. Finally, he declared that he had been unable to obtain capital to work the guano deposits or to give bond, but was now prepared to do both; and he prayed that the island might be treated as appertaining to the United States, in conformity with the act of Congress. He subsequently sent on a bond. (Mr. Stevens, min. to Hawaii, to Mr. Blaine, Sec. of State, Oct. 14, 1889, 26 MS. Dispatches from Hawaii; Mr. Blaine, Sec. of State, to Mr. Stevens, min. to Hawaii, Jan. 10, 1890, MS. Inst. Hawaii, III. 108; Mr. Perkins, M. C., to Mr. Hay, Sec. of State, Dec. 24, 1901, MS. Misc. Let.; Mr. Hill, Acting Sec. of State, to Mr. Perkins, M. C., Jan. 2, 1902, 256 MS. Dom. Let. 557; Mr. Perkins to Sec. of State, Feb. 3, 1902, MS. Misc. Let.; Sec. of State to Mr. Perkins, Feb. 8, 1902, 257 MS. Dom. Let. 454; Sec. of Treasury to Sec. of State, June 2, 1902, MS. Misc. Let.) Official communications from the Japanese Government state that the usufruct of the island for ten years, from Sept. 1, 1898, has been granted to a Japanese subject. This grant followed a public notification by the Japanese Government July 24, 1898, that the island belonged to Japan. Captain Rosehill's bond was filed in 1902. The United States "has not claimed title to or asserted sovereignty over the island, and such a conclusion as it may reach touching a merely jurisdictional claim would necessarily be limited by the conditions fixed in the Guano acts." (Mr. Adee, Acting Sec. of State, to Mr. Perkins, M. C., Sept. 5, 1902, MSS., Dept. of State.)

*Monges, Los (Los Monges, The Monks).*—Messrs. John E. Gowen and Franklin E. Copeland, citizens of the United States, discovered early in 1854 a guano deposit in the group and proceeded to work it. Late in 1855 the Venezuelan authorities, having previously notified them to quit, expelled them and took temporary possession of their property. The sovereignty of the islands was contested by Colombia and Venezuela. Without regard to the merits of this contest, an award was subsequently made in favor of

Messrs. Gowen and Copeland, against Venezuela, for \$20,000 damages, on the ground that as the islands, which were vacant and sterile, and lay far out to sea, were, at the time of the occupation, apparently "no man's land," the claimants possessed "an equity to be reimbursed for their outlay in taking possession of what was apparently derelict and abandoned property." (Commission under the treaty between the United States and Venezuela of Dec. 5, 1885, Int. Arbitrations, IV. 3354-3359.)

*Morant Keys*.—J. W. Jennett claimed, May 23, 1869, to have discovered and taken possession of the islands in 1866. No action was taken by the Department of State beyond acknowledging the receipt of these and certain subsequent papers, as to the effect of which its opinion was reserved. (Mr. Evarts, Sec. of State, to Mr. Sherman, Mar. 20, 1878, 122 MS. Dom. Let. 228; Mr. Hunter, Acting Sec. of State, to Mr. Rice, Sept. 30, 1879, 130 id. 92.) The islands appear to have been annexed by Great Britain to Jamaica. (Mr. Frelinghuysen, Sec. of State, to Mr. Lamar, April 26, 1882, 141 MS. Dom. Let. 615; Mr. Porter, Assist. Sec. of State, to Messrs. Coudert, May 28, 1885, 155 id. 518.)

*Mosquito Cays*.—No claim has been made by the United States to these islands, which lie off the Mosquito coast (Nicaragua). (Mr. Uhl, Acting Sec. of State, to Mr. Lambert, Feb. 27, 1895, 200 MS. Dom. Let. 691. See also Mr. Marcy, Sec. of State, to Messrs. Thompson et al., Dec. 27, 1853, 42 MS. Dom. Let. 124.)

*Nantucket*, or *New Nantucket*, Island.—See Baker's Island.

*Navassa Island*.—Peter Duncan, Nov. 18, 1857, alleged discovery on the 1st of the preceding July and taking possession on the 19th of September. A certificate was issued by Mr. Cass, as Secretary of State, Dec. 8, 1859, and protection was given, against the protest of Hayti, to the citizens of the United States engaged in the removal of the guano. (Jones v. United States (1890), 137 U. S. 202; 8 Ex. Doc. 37, 36 Cong. 1 sess.) The United States denied the claim of Hayti on the ground that the latter had never established title to the island either by occupying it or by asserting and maintaining jurisdiction over it. (Mr. Fish, Sec. of State, to Mr. Preston, Dec. 31, 1870, June 10, 1873, MS. Notes to Hayti, I. 124, 153.) In 1889 serious riots occurred on the island, and several persons were killed. At the request of the United States consul at Kingston, Jamaica, a British war ship went to the scene. (Mr. Adee, Acting Sec., to Mr. Lincoln, Sept. 19, 1889, MS. Inst. Gr. Br., XXIX. 127. See President Harrison's Third Annual Message, Dec. 9, 1891; Mr. Adee, Second Assist. Sec. of State, to Gen. Harrison, Dec. 3, 1897, 223 MS. Dom. Let. 141.) Complaint was made by the Spanish minister, Sept. 4, 1896, that the steamer *Dauntless* had taken on board men, arms, and munitions of war at the island and landed them in Cuba in aid of the insurgents. (Mr. Rockhill, Acting Sec. of State, to the Attorney-General, Sept. 10, 1896, 212 MS. Dom. Let. 432. The men, arms, and ammunition were shipped on the steamer *Laurada* at Philadelphia, and were transferred to the *Dauntless* at Navassa. It was in connection with this transaction that John D. Hart was afterwards convicted of violating, at Philadelphia, section 5286 of the Revised Statutes of the United States, against unlawful expeditions.) It was reported, in 1898, that the island was seized and held by Haytians or Dominicans, who prevented a representative of the Navassa Phosphate Co. from landing and declared that the island no longer belonged to the United States. (Dispatch of Mr. Dent, U. S. consul at Kingston, July 10, 1898, MSS. Dept. of

State, 36 MS. Cons. Let., Kingston. See the New York Times, May 31, 1901, as to the case of four men said to have been practically abandoned on the island in consequence of differences between persons who purchased from a receiver the rights of the Navassa Phosphate Co.) The United States had not abandoned the island. (Mr. Moore, Assist. Sec. of State, to Mr. Fowler, July 9, 1898, 230 MS. Dom. Let. 107. See, also, Mr. Hay, Sec. of State, to Mr. Fowler, April 15, 1899, 236 MS. Dom. Let. 354; Mr. Adee, 2d Assist. Sec. of State, to Messrs. Musgrave, Aug. 3, 1900, 246 MS. Dom. Let. 682.)

*Pedro Keys*.—Discoverer, J. W. Jennett, 1869; he filed a bond and received a certificate. (Mr. Fish, Sec. of State, to Mrs. Stevens, May 10, 1870, 84 MS. Dom. Let. 426.) In 1878 the United States consul reported that the British claimed a prior title. March 14, 1882, the British minister notified the Department of State that the islands had been formally annexed to Jamaica on the strength of possession taken "on behalf of Her Majesty in the years 1862 and 1863." (Mr. Frelinghuysen, Sec. of State, to Treasury, Dec. 5, 1884, 153 MS. Dom. Let. 366; Mr. Porter, Assist. Sec. of State, to Messrs. Coudert, May 28, 1885, 155 id., 518; Mr. Bayard, Sec. of State, to Treasury, May 7, 1887, 164 MS. Dom. Let. 114.)

*Petrel Island*.—Discoverer, J. W. Jennett, to whom a certificate was issued. (Mr. Fish, Sec. of State, to Mrs. Stevens, May 10, 1870, 84 MS. Dom. Let. 426.)

*Phæbe Island*.—Claimed by the American Guano Co. of New York, which, in January, 1877, stated that it had dispatched a vessel to the island with men and materials. (Mr. Hunter, Acting Sec. of State, to Mr. Russell, July 3, 1880, 133 MS. Dom. Let. 491.)

*Quito Sereno*.—Discoverer, J. W. Jennett; memorial filed, 1869; bond filed, Nov. 22, and approved Nov. 26, 1869. A certificate was duly issued (Mr. Fish, Sec. of State, to Mrs. Stevens, May 10, 1870, 84 MS. Dom. Let. 426), and the island was included in a list published by the Treasury, Oct. 12, 1871. The Colombian Government, Dec. 8, 1890, inquired whether the United States had authorized Jennett to remove guano from the island, which was, it declared, notoriously the property of Colombia. Mr. Blaine, Secretary of State, Jan. 19, 1891, answered in the affirmative, and questioned Colombia's title. (MS. Notes to Colombia, VII. 178.) The Colombian Government claimed that "Roncador and Quitasueño [Quito Sereno] form part of the archipelago of Providencia belonging to the Republic," as successor of Spain; and that the inhabitants of the neighboring islands use them "for stations in certain periods of the year for the fishery of tortoise shells and to cultivate as much as possible that part of the territory." (Report of the Colombian min. of for. aff., 1894, For. Rel. 1894, 198.)

*Rogues Islands (Los Rogues)*.—Citizens of the United States claimed to have discovered guano on the islands, but their claim of title was not considered sufficient to warrant official recognition under the law on the subject. (Mr. Fish, Sec. of State, to Messrs. Grange & Co., June 10, 1871, 89 MS. Dom. Let. 528.)

*Roncador*.—The facts in regard to the discovery and bonding of the island are the same as in the case of Quito Sereno, in the diplomatic correspondence concerning which Roncador is included. (Quito Sereno, *supra*.) A certificate or proclamation was alleged to have been issued in the case of Roncador by Mr. Fish, but no record of its issuance seems to have been

made in the Department of State. (Mr. Moore, Third Assist. Sec., to Mr. Jennett, Nov. 19, 1889, 175 MS. Dom. Let. 348.)

*St. Paul's Rocks*.—No notice appears to have been filed of the discovery of these islands, which lie in the Atlantic Ocean near the equator in about 30 W. long. (Mr. Uhl, Assist. Sec. of State, to Mr. Read, Nov. 15, 1893, 194 MS. Dom. Let. 270.)

*San Andreas*.—The opinion was expressed that the Department would not be warranted in further pressing a complaint against the Colombian Government in respect of this island. (Mr. Gresham, Sec. of State, to Mr. Winter, March 28, 1895, 201 MS. Dom. Let. 321.)

*Serranilla Keys*.—Discoverer, James W. Jennett, Dec. 1866; declaration of discovery filed, May 24, 1869; bonds given, Sept. 8, 1879, and Sept. 13, 1880. Various assignments were made. (Mr. Brown, chief clerk, to Mr. Neymann, Jan. 24, 1879, 126 MS. Dom. Let. 230; Mr. Hunter, Acting Sec., to Mr. Rice, Sept. 30, 1879, 130 id. 92; Mr. Frelinghuysen, Sec. of State, to Mr. Ransom, Dec. 26, 1884, 153 id. 511; Mr. Porter, Assist. Sec., to Mr. Saunders, April 2, 1885, 154 id. 658; Mr. Day, Assist. Sec. of State, to Mr. Hildebrand, Nov. 16, 1897, 222 id. 460.)

*Serrano Keys*.—J. W. Jennett, by letters of Aug. 13 and 29, 1868, asserted a claim under the act of 1856 to the Island of Serrano and certain adjacent keys. The minister resident of Nicaragua and Honduras protested against the occupation of the islands, on the ground that they were within the jurisdiction of and occupied by Honduras. "This claim on the part of Honduras is now under examination by this Department. No certificate can be issued to you by this Department until the merits of that claim of the Republic of Honduras are settled." (Mr. Seward, Sec. of State, to Mr. Jennett, Sept. 14, 1868, 79 MS. Dom. Let. 312.) A certificate was issued to Jennett, Dec. 11, 1868. (Mr. Evarts, Sec. of State, to Mr. Russell, April 5, 1878, 122 MS. Dom. Let. 384.) His title "is apparently good and he or his legitimate assignee seems to be entitled to the protection of the United States against the interference of any foreign government." He appeared to have made assignments of his interest. (Mr. Fish, Sec. of State, to Mrs. Stevens, June 21, 1869, 81 MS. Dom. Let. 289.)

*Sombrero Island*.—"After careful investigation of the records and files of this Department nothing has been discovered to show that the title of citizens of the United States to the guano on that island was ever recognized by the President." (Mr. Seward, Sec. of State, to Mr. McCulloch, Aug. 14, 1868, 79 MS. Dom. Let. 204. See, also, Mr. Seward to Mr. Welles, Sept. 10, 1861, 55 id. 63.)

*Svan Islands*.—The "proof filed by the New York Guano Company, to secure the protection of the Government for their possession" was "considered sufficient to authorize the Government to extend the protection asked for, under the act of August 18, 1856." (Mr. Seward, Sec. of State, to Mr. Parish, March 23, 1863, 60 MS. Dom. Let. 68.) As the result of assignments, the rights under the act in 1894 were claimed by the Pacific Guano Co. (Mr. Uhl, Acting Sec. of State, to Mr. Brash, Feb. 27, 1894, 195 MS. Dom. Let. 590. See, as to the status of the islands, Mr. Gresham, Sec. of State, to Mr. Brash, Oct. 29, 1894, 199 id. 266. The papers relating to the islands are enumerated in Mr. Hill, Assist. Sec. of State, to Mr. Torrey, Nov. 19, 1898, 232 MS. Dom. Let. 608. See, also, Mr. Hill, Assist. Sec. of State, to Mr. Jewett, Feb. 17, 1899, 235 MS. Dom. Let. 35.)

*Triangle Islands.*—These islands are three in number—two of them constituting the Eastern Triangle, and the other the Western. See Western Triangle.

*Vivorilla Key.*—Julius R. Schultz made a claim as discoverer; but, as the key was claimed by both Nicaragua and Honduras, it was not recognized as appertaining to the United States. (For. Rel. 1888, I. 119, 132.) Neither Nicaragua nor Honduras, however, seemed disposed to disturb Mr. Schultz' possession. (Mr. Rives, Assist. Sec. of State, to Mr. Moale, Jan. 25, 1888, 166 MS. Dom. Let. 671; Dec. 12, 1888, 171 id. 71.)

*Western Triangle.*—Discoverer, J. W. Jennett, Feb., 1879; declaration, Sept. 1, 1879; bond, Sept. 13, 1880. (Mr. Gresham, Sec. of State, to Mr. Gordon, Oct. 19, 1893, 194 MS. Dom. Let. 57.) Assignments were made. (Mr. Payson, Third Assist. Sec. of State, to Mr. Lighthouse, Jan. 23, 1880, 131 MS. Dom. Let. 342; Mr. Hay, Assist. Sec., to Mr. Olburn, March 2, 1880, 132 id. 46.) The island was afterwards stricken from the list. (Mr. Uhl, Acting Sec. of State, to Treasury, Oct. 3, 1894, 199 MS. Dom. Let. 49; to Mr. Brash, Oct. 15, 1894, id. 147; Mr. Gresham, Sec. of State, to Treasury, Nov. 17, 1894, id. 437.)

*Woody Island.*—No notice of discovery seems ever to have been filed. (Mr. Adee, Second Assist. Sec. of State, to Mr. Long, Nov. 18, 1887, 166 MS. Dom. Let. 179.)

#### 14. PROPOSALS OF ANNEXATION.

##### (1) CANADA.

##### § 116.

The Articles of Confederation, 1778, provided: "Article XI. Canada acceding to this Confederation, and joining in the measures of the United States, shall be admitted into and entitled to all the advantages of this union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States."

The text of the Articles of Confederation had been in existence, in its final form, nearly three months (since Nov. 15, 1777) when the treaty of alliance with France of Feb. 6, 1778, was signed. By this treaty it was stipulated (Art. V.) that, if the United States should think fit to attempt the reduction of the British power remaining in the northern parts of America, or the islands of Bermudas, those countries or islands, in case of success, should be confederated with or dependent upon the United States; and the King of France (Art. VI.) renounced forever the possession of the Bermudas, as well as of any territory on the North American continent then or previously belonging to Great Britain. He reserved, however (Art. VII.), the right to attack and obtain possession of any of the islands in or near the Gulf of Mexico which were then under the British power.

On July 2, 1866, the chairman of the Committee on Foreign Affairs of the House of Representatives reported a bill to the effect, that when the Department of State should be officially informed that Great Britain and the several British provinces in Canada accepted the proposi-

tion of annexation, the President should declare by proclamation that Nova Scotia, New Brunswick, Lower Canada, Upper Canada, and the territories of Selkirk, of Saskatchewan, and of Columbia should be admitted into the United States as States and Territories.<sup>a</sup> This resolution was not acted on, but on March 27, 1867, a resolution from the Committee on Foreign Affairs was passed in the House without opposition, to the effect that the people of the United States regarded with extreme solicitude the confederation proposed on the northern frontier without the assent of the people of the provinces to be confederated, such a measure being likely to increase the embarrassment already existing between Great Britain and the United States.<sup>b</sup>

"I enclose a copy of a paper purporting to be a memorial from inhabitants of British Columbia, urging the transfer of that colony to the United States, which has been presented to the President, and which has already been printed in the public papers of this city and elsewhere through the agency of the parties charged with its presentation.

"In an informal conversation with Mr. Thornton, he referred to this petition, and I showed him the original. As Mr. Thornton had very frequently and very openly, not only to me, but in the presence of others, expressed the willingness of the British Government to terminate its political connection with the provinces on this continent, whenever it should appear that a separation was desired by its present dependencies, I took the occasion to suggest that possibly the desire indicated by these petitioners, taken in connection with the troubles in the Red River or Selkirk settlement, and the strong opposition to confederation manifested in the maritime provinces, might induce his Government to consider whether the time was not near when the future relation of the colonies to Great Britain must be contemplated with reference to these manifestations of restlessness, and to some extent of dissatisfaction with their present condition.

"I need not, however, multiply the arguments which tend to the conviction that at no very distant day the question of the independence of this territory must be practical and pressing.

"If Great Britain will assent to such independence, the danger of a strife upon our borders, and of an Indian war, originating in the British possessions, but not recognizing the boundary which that Government and the United States have accepted, will be avoided.

"You will exercise your discretion in reference to this question, availing yourself of every opportunity to obtain information as to the real sentiments of the British Government on the question of the separation of the colonies from the mother country, and when opportunity

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<sup>a</sup> Amer. Ann. Encyclop. 1866, 78.

<sup>b</sup> Amer. Ann. Encyclop. 1867, 275; 2 Lawrence Com. sur droit int. 313.

offers indicating the facts which seem to make such separation a necessity."

Mr. Fish, Sec. of State, to Mr. Motley, min. to England, Jan. 14, 1870, MS. Inst. Gr. Brit. XXII. 163.

During 1869 and 1870 the question of the cession of Canada to the United States in connection with the settlement of the Alabama claims was frequently discussed between Mr. Fish and Sir Edward Thornton, then British minister at Washington. An account of their negotiations is given by Mr. Charles Francis Adams in his essay on the treaty of Washington, an essay filled with interesting and original historical matter touching the subject to which it relates. (Adams, *Lee at Appomattox and other Papers*, 156.) Mr. Adams adverts, in the course of his essay, to the great change in sentiment that has taken place in England since 1870 in regard to the colonies, the feeling of apparent indifference that once prevailed having given way to the conviction that the colonies are "both the glory and the strength" of the Empire.

(2) SALVADOR.

§ 117.

"The province of St. Salvador, one of the constituent States of the Republic of Guatemala, by a solemn decree of its Congress, freely chosen by the people, did on the 5th day of December, 1822, propose its annexation to our own Union, as one of the United States. This measure was adopted as an expedient for escaping from the oppression with which they were menaced, of being annexed by force to the Mexican Empire while under the government of Yturvide. For the purpose of carrying it into effect three commissioners were despatched with full powers, who came to the United States, and in the beginning of September, 1823, repaired to the city of Washington. In the interval between the time of their appointment and that of their arrival here a revolution in Mexico had overthrown the government of Yturvide, and the Republican rulers who succeeded to his power acknowledged the right of the people of Guatemala to institute a government for themselves, and withdrew all claim of supremacy over them. This course of events superseded the determination which the Congress of St. Salvador had formed, of offering to unite their fortunes with our Confederation."

Mr. Clay, Sec. of State, to Mr. Williams, chargé d'affaires to the Federation of the Centre of America, Feb. 10, 1826, MS. Inst. to U. States Ministers, XI. 5.

(3) CUBA.

§ 118.

"7 February [1823]. I had some interesting conversation to-day with Mr. Poinsett concerning . . . Cuba, where he has lately been on public service. . . . Cuba, he says, is ripe for union with the U. S. whenever Spain is forced to change her constitution. Even the old Spaniards, and the Creoles to a man—he had direct communi-



cations to this effect with many of their most influential characters. They do not, however, desire any change until Spain compels it by some radical alterations in her present constitution. Whenever she does Cuba will ask for our protection and for admission into the Union. If we reject them they will then apply to England. But at present, Mr. P. says, they are extremely averse to her superintendence. There have been two English agents at Havana for some time. Cuba has had an agent here in communication with our Government. His name is Morales.

"It is a very momentous measure for the decision of this country. Much may be said against it. But I have long tho't that whenever Cuba presents herself, without any forcing or manœuvring on our part, we must e'en take the goods the Gods provide us. The Western States are all anxiety for it. To them Cuba in British hands would be intolerable. The Southern States have no objection. The middle and east would consent, tho' the latter perhaps not freely, as it would add immensely to a preponderance which they see with jealousy and dread already."

Diary of Mr. Ingersoll, Life of Charles Jared Ingersoll, 111-112.

"These islands [Cuba and Porto Rico], from their local position are natural appendages to the North American continent, and one of them [Cuba], almost in sight of our shores, from a multitude of considerations has become an object of transcendent importance to the commercial and political interests of our Union. Its commanding position, with reference to the Gulf of Mexico and the West India seas; the character of its population; its situation midway between our southern coast and the island of San Domingo; its safe and capacious harbor of the Havana, fronting a long line of our shores destitute of the same advantage; the nature of its productions and of its wants, furnishing the supplies and needing the returns of a commerce immensely profitable and mutually beneficial, give it an importance in the sum of our national interests with which that of no other foreign territory can be compared, and little inferior to that which binds the different members of this Union together. Such, indeed, are, between the interests of that island and of this country, the geographical, commercial, moral, and political relations formed by nature, gathering, in the process of time, and even now verging to maturity, that, in looking forward to the probable course of events for the short period of half a century, it is scarcely possible to resist the conviction that the annexation of Cuba to our Federal republic will be indispensable to the continuance and integrity of the Union itself.

"It is obvious, however, that for this event we are not yet prepared. Numerous and formidable objections to the extension of our territorial dominions beyond sea present themselves to the first contemplation of

the subject; obstacles to the system of policy by which alone that result can be compassed and maintained are to be foreseen and surmounted, both from at home and abroad; but there are laws of political as well as of physical gravitation; and if an apple, severed by the tempest from its native tree, can not choose but fall to the ground, Cuba, forcibly disjoined from its own unnatural connection with Spain, and incapable of self-support, can gravitate only towards the North American Union, which, by the same law of nature, can not cast her off from its bosom."

Mr. Adams, Sec. of State, to Mr. Nelson, min. to Spain, Apr. 28, 1823, Br. and For. St. Pap. (1853-'4), XLIV. 138. Extracts from these instructions are given in Am. St. Pap. For. Rel. V. 408.

"I candidly confess that I have ever looked on Cuba as the most interesting addition which could ever be made to our system of States. The control which, with Florida point, this island would give us over the Gulf of Mexico, and the countries and the Isthmus bordering on it, as well as all those whose waters flow into it, would fill up the measure of our political well-being."

Mr. Jefferson to Mr. Monroe, Oct. 24, 1823, S. Doc. 26, 57 Cong. 1 sess.

"If Cuba were annexed to the United States, we should not only be relieved from the apprehensions which we can never cease to feel for our own safety and the security of our commerce whilst it shall remain in its present condition; but human foresight can not anticipate the beneficial consequences which would result to every portion of our Union. This can never become a local question.

"1. With suitable fortifications at the Tortugas, and in possession of the strongly fortified harbor of Habana as a naval station on the opposite coast of Cuba, we could command the outlet of the Gulf of Mexico between the peninsula of Florida and that island. This would afford ample security both to the foreign and coasting trade of the Western and Southern States which seek a market for their surplus productions through the ports of the Gulf.

"2. Under the Government of the United States, Cuba would become the richest and most fertile island of the same extent throughout the world. . . .

"It would be difficult to estimate the amount of bread-stuffs, rice, cotton, and other agricultural, as well as manufacturing and mechanical productions;—of lumber, of the products of our fisheries and of other articles which would find a market in that island, in exchange for their coffee, sugar, tobacco and other productions. This would go on, increasing with the increase of its population and the development of its resources; and all portions of the Union would be benefited by the trade.

“Desirable, however, as the possession of the island may be to the United States, we would not acquire it except by the free consent of Spain. Any acquisition not sanctioned by justice and honor, would be dearly purchased. Whilst such is the determination of the President, it is supposed that the present relations between Cuba and Spain might incline the Spanish Government to cede the island to the United States, upon the payment of a fair and full consideration. . . .

“The apprehension which existed for many years after the origin of this Government, that the extension of our federal system would endanger the Union, seems to have passed away. Experience has proved that this system of confederated Republics, under which the Federal Government has charge of the interests common to the whole, whilst local governments watch over the concerns of the respective States, is capable of almost indefinite extension, with increasing strength. This, however, is always subject to the qualification that the mass of the population must be of our own race, or must have been educated in the school of civil and religious liberty. With this qualification, the more we increase the number of confederated States, the greater will be the strength and security of the Union; because the more dependent for their mutual interests will the several parts be upon the whole and the whole upon the several parts.

“It is true that of the 418,291 white inhabitants which Cuba contained in 1841, a very large proportion is of the Spanish race. Still many of our citizens have settled on the island and some of them are large holders of property. Under our Government it would speedily be *Americanized*, as Louisiana has been.

“Within the boundaries of such a federal system alone, can a trade, exempt from duties and absolutely free, be enjoyed. With the possession of Cuba, we should have throughout the Union, a free trade on a more extended scale than any which the world has ever witnessed—arousing an energy and activity of competition which would result in a most rapid improvement in all that contributes to the welfare and happiness of the human race. What state would forego the advantages of this vast free trade with all her sisters, and place herself in lonely isolation!

“But the acquisition of Cuba would greatly strengthen our bond of Union. Its possession would secure to all the States within the valley of the Mississippi and the Gulf of Mexico, free access to the ocean; but this security could only be preserved whilst the shipbuilding and navigating States of the Atlantic shall furnish a navy sufficient to keep open the outlets from the Gulf to the Ocean. Cuba, justly appreciating the advantages of annexation, is now ready to rush into our arms. Once admitted she would be entirely dependent for her prosperity and even existence, upon her connection with the Union; whilst the rapidly increasing trade between her and the other States, would shed its

benefits and its blessings over the whole. Such a state of mutual dependence, resulting from the very nature of things, the world has never witnessed. This is what will insure the perpetuity of our Union.

“With all these considerations in view, the President believes that the crisis has arrived when an effort should be made to purchase the Island of Cuba from Spain, and he has determined to entrust you with the performance of this most delicate and important duty. The attempt should be made, in the first instance, in a confidential conversation with the Spanish Minister for Foreign Affairs. A written offer might produce an absolute refusal in writing, which would embarrass us, hereafter, in the acquisition of the Island. Besides, from the incessant changes in the Spanish Cabinet and policy, our desire to make the purchase might thus be made known in an official form to Foreign Governments and arouse their jealousy and active opposition. Indeed, even if the present Cabinet should think favorably of the proposition, they might be greatly embarrassed by having it placed on record; for, in that event, it would almost certainly, through some channel, reach the opposition, and become the subject of discussion in the Cortes. Such delicate negotiations, at least in their incipient stages, ought always to be conducted in confidential conversation, and with the utmost secrecy and despatch.

“At your interviews with the Minister for Foreign Affairs, you might introduce the subject by referring to the present distracted condition of Cuba, and the danger which exists that the population will make an attempt to accomplish a revolution. This must be well known to the Spanish Government. In order to convince him of the good faith and friendship towards Spain with which this Government has acted, you might read to him the first part of my despatch to General Campbell, and the order issued by the Secretary of War to the Commanding General in Mexico, and to the officer having charge of the embarkation of our troops at Vera Cruz. You may then touch delicately upon the danger that Spain may lose Cuba by a revolution in the Island, or that it may be wrested from her by Great Britain, should a rupture take place between the two countries, arising out of the dismissal of Sir Henry Bulwer, and be retained to pay the Spanish debt due to the British bondholders. You might assure him, that whilst this Government is entirely satisfied that Cuba shall remain under the dominion of Spain, we should in any event resist its acquisition by any other nation. And, finally you might inform him, that under all these circumstances, the President had arrived at the conclusion that Spain might be willing to transfer the island to the United States for a fair and full consideration. You might cite as a precedent, the cession of Louisiana to this country by Napoleon, under somewhat similar circumstances, when he was at the zenith of his power and glory. I have merely presented these topics in their natural order, and you can fill ,

up the outline from the information communicated in this dispatch, as well as from your own knowledge of the subject.

Should the Minister for Foreign Affairs lend a favorable ear to your proposition, then the question of the consideration to be paid would arise; and you have been furnished with information in this despatch which will enable you to discuss that question. In justice to Mr. Calderon, I ought here to observe, that whilst giving me the information before stated, in regard to the net amount of revenue from Cuba which reached old Spain, he had not then, and has not now, the most remote idea of our intention to make an attempt to purchase the island.

"The President would be willing to stipulate for the payment of one hundred millions of dollars for the island, and its dependencies, in ten equal annual installments. This, however, is the maximum price; and if Spain should be willing to sell, you will use your best efforts to purchase it at a rate as much below that sum as practicable."

Mr. Buchanan, Sec. of State, to Mr. Saunders, min. to Spain, June 17, 1848, MS. Inst. Spain, XIV. 256; Extract, Br. and For. State Papers (1843. 1844), XLIV. 178; H. Ex. Doc. 121, 32 Cong. 1 sess.

Mr. Buchanan, as President, in his annual message of December 19, 1859, recurred to the subject of the annexation of Cuba. After summarizing the arguments elaborated in the instructions which he gave as Secretary of State to Mr. Saunders, he stated that the publicity which had been given to former negotiations and the large appropriation which might be required to effect the purpose in view, rendered it expedient, before attempting to renew negotiations, to lay the whole subject before Congress. "I refer," he added, "the whole subject to Congress and commend it to their careful consideration." (Richardson, Messages and Papers of the Presidents, V. 510-511.) He again invited the "serious attention of Congress to this important subject," in his annual message of March 8, 1859, and yet again in his annual message of December 3, 1860. (Richardson, Messages, etc., V. 561, 642.)

"As to the purchase of Cuba from Spain, we do not desire to renew the proposition made by the late Administration on this subject. It is understood that the proposition, made by our late minister at Madrid, under instructions from this Department, or from the late President of the United States, was considered by the Spanish ministry as a national indignity, and that the sentiment of the ministry was responded to by the Cortes. After all that has occurred, should Spain desire to part with the island, the proposition for its cession to us should come from her; and in case she should make any, you will content yourself with transmitting the same to your Government for consideration."

Mr. Clayton, Sec. of State, to Mr. Barringer, min. to Spain, Aug. 2, 1849, MS. Inst. Spain, XIV. 295.

Mr. Saunders, after seeking to carry out his instructions (*supra*), reported that the Spanish minister had declared, with reference to the cession of Cuba, "that it was more than any minister dare to entertain such a proposition;

that he believed such to be the feeling of the country, that, sooner than see the island transferred to any power, they would prefer seeing it sunk in the ocean." (Mr. Saunders, min. to Spain, to Mr. Buchanan, Sec. of State, Dec. 14, 1848, Br. & For. State Papers (1853. 1854), XLIV. 195, 196; H. Ex. Doc. 121, 32 Cong. 1 sess.)

President Buchanan, Jan. 31, 1856, informed the Senate that no correspondence in relation to the purchase of Cuba had taken place except that which had been communicated to Congress. (S. Ex. Doc. 16, 35 Cong. 2 sess.)

"I have . . . , in common with several of my predecessors, directed the ministers of France and England to be assured that the United States entertain no designs against Cuba, but that, on the contrary, I should regard its incorporation into the Union at the present time as fraught with serious peril. Were this island comparatively destitute of inhabitants or occupied by a kindred race, I should regard it, if voluntarily ceded by Spain, as a most desirable acquisition. But under existing circumstances I should look upon its incorporation into our Union as a very hazardous measure. It would bring into the Confederacy a population of a different national stock, speaking a different language, and not likely to harmonize with the other members. It would probably affect in a prejudicial manner the industrial interests of the South, and it might revive those conflicts of opinion between the different sections of the country which lately shook the Union to its center, and which have been so happily compromised."

President Fillmore, annual message, December 6, 1852, Richardson, Messages and Papers of the Presidents, V. 165.

"With an experience thus suggestive and cheering, the policy of my Administration will not be controlled by any timid forebodings of evil from expansion. Indeed, it is not to be disguised that our attitude as a nation and our position on the globe render the acquisition of certain possessions not within our jurisdiction eminently important for our protection, if not in the future essential for the preservation of the rights of commerce and the peace of the world."

Pres. Pierce, Inaugural Address, March 4, 1853, Richardson, Mess. and Pap. of the Pres. V. 198.

"It is no longer, I believe, a secret in Spain that the United States wish to obtain the cession [of Cuba], and that you have authority to treat on the subject. . . . Should you find persons of position or influence disposed to converse on the subject, the considerations in favor of a cession are so many and so strong that those who can be brought to listen would very likely become converts to the measure. But should you have reason to believe that the men in power are averse to entertaining such a proposition—that the offer of it would be offensive to the national pride of Spain, and that it would find no

favor in any considerable class of the people—then it will be but too evident that the time for opening, or attempting to open, such a negotiation has not arrived. . . . The language of some part of the report might perhaps be so construed as to sustain the inference that you and your associates in the conference were of opinion that the proposition should be made, though there should be no chance of its being entertained, and that it should be accompanied with the open declaration or a significant suggestion that the United States were determined to have the island, and would obtain it by other means if their present advances, so advantageous to Spain, be refused by her; but other parts of the report repel this inference. . . . I will only remark that the acquisition of Cuba by the United States would be preeminently advantageous in itself and of the highest importance as a precautionary measure of security. However much we might regret the want of success in our efforts to obtain the cession of it, that failure would not, without a material change in the condition of the island, involve imminent peril to the existence of our government. But should the contingency suggested in your report ever arise, there is no reason to doubt that the case will be promptly met by the deliberate judgment and decisive action of the American people.”

Mr. Marcy, Sec. of State, to Mr. Soulé, min. to Spain, Nov. 13, 1854, H. Ex. Doc. 93, 33 Cong. 2 sess. 134, 135–136.

The “report” referred to in the foregoing passage is the so-called “Ostend Manifesto” signed by Messrs. Soulé, Buchanan, and Mason. The “contingency” suggested by them was that which would arise in case Spain should refuse to sell Cuba, and it should appear that the island, in her possession, “seriously endangered our internal peace and the existence of our cherished Union.” (H. Ex. Doc. 93, 33 Cong. 2 sess. 131.)

See also, Curtis, *Life of Buchanan*, II. 136–141; *Lawrence’s Wheaton* (1863), 149, 150; Mr. Marcy, Sec. of State, to Mr. Buchanan, min. to England, June 27, 1854, MS. Inst. Great Britain.

“An examination of the large mass of correspondence in regard to Cuba, since 1869, printed in *Executive Documents and Foreign Relations*, will show you that no proposal for the annexation of that island to the United States has been made by or on behalf of this Government.” (Mr. Adee, Second Assist. Sec. of State, to Mr. Ohl, Jan. 14, 1898, 224 MS. Dom. Let. 434.)

The United States “have constantly indulged the belief that they might hope at some day to acquire those islands [Cuba and Porto Rico] by just and lawful means, with the consent of their sovereign.”

Mr. Seward, Sec. of State, to Mr. Schurz, min. to Spain, April 27, 1861, MS. Inst. Spain, XV. 263.

#### (4) YUCATAN.

#### § 119.

In 1848, an Indian outbreak having occurred in Yucatan, the authorities offered to transfer the “dominion and sovereignty” to the United States, and at the same time made a similar offer to Great Britain and Spain. President Polk recommended the occupation of

the territory by the United States. May 4, 1848, a bill to enable the President "to take temporary military occupation of Yucatan" was introduced in the Senate, and its passage was urged on grounds both of humanity and of national policy. A few days later, however, information was received of the conclusion of a treaty between the Indians and the whites, and the bill was not again called up.

1 Cong. Globe, 30th Cong. 1 sess., 709, 778; S. Ex. Doc. 40, 30 Cong. 1 sess.; S. Ex. Doc. 45, 30 Cong. 1 sess.; Br. & For. State Papers (1860. 1861), LI. 1184-1237.

(5) ISLANDS AT PANAMA.

§ 120.

In 1856 the United States, in order to protect and render secure the transportation of persons and property across the Isthmus of Panama, endeavored to obtain the cession from New Granada of the islands in the Bay of Panama, viz, Taboga, Flamingo, Ilenao, Perico, and Culebra. A special mission was sent out to endeavor to obtain the cession, but it was unsuccessful.

Mr. Marcy, Sec. of State, to Messrs. Morse and Bowlin, Dec. 3, 1856, S. Ex. Doc. 112, 46 Cong. 2 sess.; Correspondence in relation to the proposed Interoceanic Canal between the Atlantic and Pacific oceans, the Clayton-Bulwer treaty, and the Monroe Doctrine, Government Printing Office, 1885, 21-27.

(6) SANTO DOMINGO; SAMANA BAY.

§ 121.

"You have communicated to me certain views and wishes which have been expressed to you by President Baez, and his confidential minister, Mr. Felix Delmonte. These views and desires substantially are that the United States shall immediately publish a declaration placing the Dominican Republic under the protection of the United States and shall sustain the proclamation by sending vessels of war to take possession of Samana and Mancevilla bays and any other points that military strategy might indicate, and thus pave the way for annexation to the United States by Mr. Baez, who, although President by name, is virtually clothed with dictatorial powers. You have given me the considerations out of which these views have arisen. These considerations are that the proceedings thus solicited would impart great confidence to the people of Dominica, and likewise to foreigners who might wish to settle there, but are at present prevented by the constant changes and uncertainty of the Dominican Government; that the late revolution in Spain may lead to important revolutions in the condition of affairs in Cuba and Porto Rico, and may have a tendency to induce many planters to remove from those islands to St. Domingo; that there is a prospect of a general war in Europe, and that there could be no more propitious time than the present for the United States to place St. Domingo



under their protection; that, in the opinion of Mr. Baez and Mr. Delmonte, the Dominican Republic would in that case at once seek admission into the Union, which is the fervent wish of a large portion of its people. You give your own opinion that the extinction of slavery in the United States has prepared the way for the important proceeding which those gentlemen have thus recommended, and that it is eminently desirable in view of the decline which has taken place within the last century in the productions and revenues of the island of St. Domingo.

“President Baez and his minister can not be unaware that the proceeding which they propose, however beneficent its purposes might be, would nevertheless in its nature be an act of war, and that as such it transcends the power of the executive government, and falls within the exclusive province of Congress.

“In submitting such a transaction to the governments of mankind, it would be difficult to distinguish it from the attempt which was made during our recent civil war by Spain to reannex the Dominican Republic to her own dominion by means of an illegal arrangement made between the Spanish Government and Santa Anna, then President of the Dominican Republic. There would, indeed, be this difference, that in the case proposed by President Baez the Dominican Republic would be virtually transferred to and accepted by an American Republic whereas in the other case it was an attempt to subvert a republic at St. Domingo and annex it as a province to one of the ancient European monarchies. It may be doubted whether this distinction would be regarded as a moral justification of the proceeding.

“If, however, we lay that question aside, there still remains an inherent difficulty in the case. To establish the protectorate in St. Domingo would be virtual annexation by act of war, and not by the consent and agreement of the people of the Dominican Republic. The Congress of the United States are always disinclined to foreign military conquest, perhaps more so now than at any time heretofore. It seems unlikely, therefore, that Congress would entertain any other proposition for the annexation of Dominica than one which should originate with and have the sanction of the Dominican people, expressed in a regular constitutional manner. Nevertheless, the subject is a very important one, and I reserve further consideration of it until Congress shall have assembled, which will be on the first Monday in December.

“You may read this dispatch, confidentially, to President Baez and his secretary.”

Mr. Seward, Sec. of State, to Mr. Smith, commercial agent at St. Domingo City, Nov. 17, 1868, MS. Dispatches to Consuls, LIII. 61.

“Comprehensive national policy would seem to sanction the acquisition and incorporation into our Federal Union of the several adjacent continental and insular communities as speedily as it can be done

and the Isthmus transit of commerce. It possesses the richest soil, best and most capacious harbors, most salubrious climate, and the most valuable products of the forest, mine, and soil of any of the West India Islands. Its possession by us will in a few years build up a coastwise commerce of immense magnitude, which will go far toward restoring to us our lost merchant marine. It will give to us those articles which we consume so largely and do not produce, thus equalizing our exports and imports. In case of foreign war it will give us command of all the islands referred to, and thus prevent an enemy from ever again possessing himself of rendezvous upon our very coast. At present our coast trade between the States bordering on the Atlantic and those bordering on the Gulf of Mexico is cut into by the Bahamas and the Antilles. Twice we must, as it were, pass through foreign countries to get by sea from Georgia to the west coast of Florida.

"San Domingo, with a stable government under which her immense resources can be developed, will give remunerative wages to tens of thousands of laborers not now upon the island. This labor will take advantage of every available means of transportation to abandon the adjacent islands and seek the blessings of freedom and its sequence—each inhabitant receiving the reward of his own labor. Porto Rico and Cuba will have to abolish slavery, as a measure of self-preservation, to retain their laborers.

"San Domingo will become a large consumer of the products of Northern farms and manufactories. The cheap rate at which her citizens can be furnished with food, tools, and machinery will make it necessary that contiguous islands should have the same advantages in order to compete in the production of sugar, coffee, tobacco, tropical fruits, &c. This will open to us a still wider market for our products. The production of our own supply of these articles will cut off more than one hundred millions of our annual imports, besides largely increasing our exports. With such a picture it is easy to see how our large debt abroad is ultimately to be extinguished. With a balance of trade against us (including interest on bonds held by foreigners and money spent by our citizens traveling in foreign lands) equal to the entire yield of the precious metals in this country, it is not so easy to see how this result is to be otherwise accomplished.

"The acquisition of San Domingo is an adherence to the 'Monroe doctrine;' it is a measure of national protection; it is asserting our just claim to a controlling influence over the great commercial traffic soon to flow from west to east by way of the Isthmus of Darien; it is to build up our merchant marine; it is to furnish new markets for the products of our farms, shops, and manufactories; it is to make slavery insupportable in Cuba and Porto Rico at once, and ultimately so in Brazil; it is to settle the unhappy condition of Cuba and end an exterminating conflict; it is to provide honest means of paying our honest

debts without overtaxing the people; it is to furnish our citizens with the necessaries of every-day life at cheaper rates than ever before; and it is, in fine, a rapid stride toward that greatness which the intelligence, industry, and enterprise of the citizens of the United States entitle this country to assume among nations.

“In view of the importance of this question, I earnestly urge upon Congress early action expressive of its views as to the best means of acquiring San Domingo. My suggestion is that, by joint resolution of the two houses of Congress, the Executive be authorized to appoint a commission to negotiate a treaty with the authorities of San Domingo for the acquisition of that island, and that an appropriation be made to defray the expenses of such commission. The question may then be determined, either by the action of the Senate upon the treaty, or the joint action of the two houses of Congress upon a resolution of annexation, as in the case of the acquisition of Texas. So convinced am I of the advantages to flow from the acquisition of San Domingo, and of the great disadvantages—I might almost say calamities—to flow from nonacquisition, that I believe the subject has only to be investigated to be approved.”

President Grant, second annual message, Dec. 5, 1870.

The vote of the Senate on the treaty referred to in the foregoing passage stood 28 to 28.

Mr. Blaine states that the negotiation began about three months after President Grant's inauguration, and that it was opened at the request of the Dominican authorities. (Twenty Years of Congress, II. 458.) The overture, indeed, was made prior to President Grant's inauguration, and doubtless bore a close connection with Mr. Seward's long-continued efforts (*infra*) to obtain a cession or lease of Samana Bay, as appears by the letter to Gen. Banks, *supra*.

Mr. Fish's instructions to Gen. Babcock, July 13, 1869, directed him to proceed to San Domingo as a special agent, to obtain information. (S. Ex. Doc. 17, 41 Cong. 3 sess. 79.) General Babcock sailed from New York July 17, 1869. On the 4th of September he signed with Mr. Gautier, the Dominican Secretary of State, a protocol containing certain articles, which were to serve as the basis for a definitive treaty of annexation. (S. Rep. 234, 41 Cong. 2 sess. 188.) General Babcock then returned to the United States. Nov. 16, 1869, he was instructed to proceed to San Domingo again, with a draft of a treaty of annexation, and of a convention for the lease of Samana Bay. The treaty and convention were to be concluded by Mr. Perry, United States commercial agent at San Domingo, who was to act under his advice. (S. Ex. Doc. 17, 41 Cong. 3 sess. 80, 95.) They both were signed Nov. 29, 1869. They were communicated to the Senate Jan. 10, 1870. (S. Ex. Doc. 17, 41 Cong. 3 sess. 98, 101.)

“In July General O. E. Babcock, one of the President's private secretaries, was dispatched to San Domingo upon an errand of which the public knew nothing. He bore a letter of instructions from Secretary Fish, apparently limiting the mission to an inquiry into the condition, prospects, and resources of the island. From its tenor the

negotiation of a treaty was not at that time anticipated by the State Department. General Babcock's mission finally resulted, however, in a treaty for the annexation of the Republic of Dominica, and a convention for the lease of the bay and peninsula of Samana—separately negotiated, and both concluded on the 29th of November, 1869. The territory included in the Dominican Republic is the eastern portion of the island of San Domingo, originally known as Hispaniola. It embraces, perhaps, two-thirds of the whole. The western part forms the Republic of Hayti. With the exception of Cuba, the island is the largest of the West India group. The total area is about 28,000 square miles—equivalent to Massachusetts, New Hampshire, Vermont, and Rhode Island combined. President Grant placed extravagant estimates upon the value of the territory which he supposed was now acquired under the Babcock treaties. In his message to Congress he expressed the belief that the island would yield to the United States all the sugar, coffee, tobacco, and other tropical products which the country would consume. 'The production of our supply of these articles,' said the President, 'will cut off more than \$100,000,000 of our annual imports, besides largely increasing our exports.' \* \* \* 'It is easy,' he went on to say, 'to see how our large debt abroad (after such an annexation) is ultimately to be extinguished.' He maintained that 'the acquisition of San Domingo will furnish our citizens with the necessities of everyday life at cheaper rates than ever before, and it is in fine a rapid stride towards that greatness which the intelligence, industry, and enterprise of our citizens entitle this country to assume among nations.'

"The subject at once led to discussion in both branches of Congress, in which the hostility to the scheme on the part of some leading men assumed the tone of personal exasperation towards General Grant. So intense was the opposition that the President's friends in the Senate did not deem it prudent even to discuss the measure which he recommended. As the best that could be done, Mr. Morton, of Indiana, introduced a resolution empowering the President to appoint three commissioners to proceed to San Domingo and make certain inquiries into the political condition of the island, and also into its agricultural and commercial value. The commissioners were to have no compensation. Their expenses were to be paid, and a secretary was to be provided. Even in this mild shape, the resolution was hotly opposed. It was finally adopted by the Senate, but when it reached the House, that body refused to concur, except with a proviso that nothing in this resolution shall be held, understood, or construed as committing Congress to the policy of annexing San Domingo. The Senate concurred in the condition thus attached, and the President approved it. It was plain that the President could not carry the annexation scheme, but he courted a searching investigation in order that the course he had pur-

sued might be vindicated by the well considered judgment of impartial men. The President's selections for the commission were wisely made. Benjamin F. Wade, of Ohio, Andrew D. White, of New York, and Samuel G. Howe, of Massachusetts, were men entitled to the highest respect, and their conclusions, based on intelligent investigation, would exert large influence upon public opinion. The commission at once visited the island (carried thither on a United States vessel of war), made a thorough examination of all its resources, held conferences with its leading citizens, and concluded that the policy recommended by General Grant should be sustained. The commissioners corroborated General Grant's assertion that the island could supply the United States with sugar, coffee, and other tropical products needed for our consumption; and they upheld the President in his belief that the possession of the island by the United States would by the laws of trade make slave labor in the neighboring islands unprofitable, and render the whole slave and caste systems odious. In communicating the report, the President made some remarks which had a personal bearing. 'The mere rejection by the Senate of a treaty negotiated by the President,' said he, 'only indicates a difference of opinion among different departments of the Government, without touching the character or wounding the pride of either. But when such rejection takes place simultaneously with the charges openly made of corruption on the part of the President, or of those employed by him, the case is different. Indeed, in such case, the honor of the nation demands investigation. This has been accomplished by the report of the commissioners, herewith transmitted, and which fully vindicates the purity of motives and action of those who represented the United States in the negotiation. And now my task is finished, and with it ends all personal solicitude on the subject. My duty being done, yours begins, and I gladly hand over the whole matter to the judgment of the American people, and of their representatives in Congress assembled.' The pointed remarks of the President were understood as referring to the speech made by Mr. Sumner when the resolution for the appointment of the commission was pending before the Senate. . . . No further attempt was made by the President to urge the acquisition of San Domingo upon Congress. It was evident that neither the Senate nor House could be induced to approve the scheme, and the Administration was necessarily compelled to abandon it. But defeat did not change General Grant's view of the question. He held to his belief in its expediency and value with characteristic tenacity.

"In his last annual message to Congress (December, 1876), nearly six years after the controversy had closed, he recurred to the subject, to record once more his approval of it. 'If my view,' said he, 'had been concurred in, the country would be in a more prosperous condition to-day, both politically and financially.' He then proceeded to restate the

question, and to sustain it with the arguments which he had presented to Congress in 1870 and 1871. His last words were, 'I do not present these views now as a recommendation for a renewal of the subject of annexation, but I do refer to it to vindicate my previous action in respect to it.'"

Blaine, *Twenty Years of Congress*, II. 458-461.

See Mr. Fish, Sec. of State, to Mr. Perry, Commercial Agent at St. Domingo, June 16, 1870, MS. Inst. Consuls, LVII. 412.

See, as to the question between President Grant and Mr. Sumner, *Pierce's Sumner*, IV. 413 et seq.; *Davis's Mr. Fish and the Alabama Claims*, 49 et seq.

For the report of the Wade commission, see S. Ex. Doc. 9, 42 Cong. 1 sess.

"While the question of annexation was pending, we had a practical interest that Hayti should abstain from fomenting dissensions against President Baez by aiding or abetting adversaries of his among his own countrymen. Having this interest, you were instructed accordingly, for it was conceived to be the duty of this Department not to allow a measure of the foreign policy of the Government in respect to one country to be thwarted or endangered by the machinations of its neighbor. That measure, however, whether for good or for evil, was defeated on another field. Though for many reasons we would have preferred that President Baez should have continued to be at the head of the Dominican Government, if this preference should not have been in accordance with the wishes of his countrymen, which seems to have been shown by the recent result, we can scarcely be said to be any longer practically interested in his ascendancy."

Mr. Fish, Sec. of State, to Mr. Bassett, Feb. 12, 1874, MS. Inst. Hayti, II. 21.

"A treaty between the United States and the Dominican Republic was signed at St. Domingo City on the 5th of October **Samana Bay.** last. [The treaty was amended by the Dominican Congress, and the ratifications were not exchanged.] An article . . . was understood to have been agreed to by the Dominican plenipotentiaries before the treaty was signed, but they were ultimately induced to omit it. This article proposed to grant certain privileges to the United States with reference to a depot for coal in the bay of Samana for the use of the United States steamers. The fact that the mail steamers between New York, Aspinwall, and San Juan del Norte usually pass the eastern end of St. Domingo shows how desirable such an accommodation would be for us. If you could induce that Government to agree to such an article you would render a material service. There is reason to apprehend that the Dominicans were deterred from acceding to our wishes on this subject in part by unfounded apprehensions that we purpose to become a territorial proprietor in that quarter, and that if allowed any

such privileges as those desired they would ultimately be converted into right of sovereignty, contrary to the will of the Dominican Government. These apprehensions are quite unfounded. The stipulation desired speaks for itself, and if granted would clearly define and restrict the limits of the privilege, which do not conflict with the rights of sovereignty of that Republic.

“If it should be found that such a place of deposit as is desired can not be obtained on Samana Bay, the most desirable place known here, any other place convenient for the purposes indicated might be acceptable, but we are not aware of any, and therefore could only agree to accept a site at Samana. Should, however, the Government of the Dominican Republic absolutely refuse to lease the place indicated and another be offered, this Government might cause an examination to be made to ascertain its fitness for the purpose, but would not treat for it before that was done.”

Mr. Marcy, Sec. of State, to Mr. Elliott, Oct. 5, 1855, MS. Inst. Special Missions, III. 69.

See the report of Captain George B. McClellan, Aug. 27, 1854, on Samana Bay as a naval station, H. Ex. Doc. 43, 41 Cong. 3 sess.; S. Ex. Doc. 17, 41 Cong. 3 sess.

“The President, by the full power which you will herewith receive, has authorized you to conclude a convention with the Dominican Republic for the cession or lease of certain territory of that Republic to the United States. . . . It is expected that if the cession should be made it will be in full sovereignty to the United States. This would of course be preferable to a lease. If, however, you should not be able to obtain the sovereignty, you may stipulate for a lease for the term of thirty years. . . . In the event of a lease, also, an article similar to the separate one marked IV, hereunto annexed, must be included. During the administration of General Pierce an effort was made to obtain a lease of land on the bay of Samana as a coal station for passenger and naval steamers, and an army engineer was sent thither in a vessel of war for the purpose of selecting the site. Unfortunately the survey was prematurely made before any arrangement had been concluded with that Government on the subject. The desire of the United States having become known to the representatives of some foreign states in that quarter, they had influence enough to thwart our plans. The late intervention of Spain in the Dominican Republic had its motive in a jealousy of our desires for a naval station in Samana. It could not be expected that the proposition now under consideration will succeed, unless caution, secrecy, and dispatch shall be observed in carrying it into effect. . . . Vice-Admiral Porter, of the Navy, will accompany you. It is not to be doubted that his great experience in foreign countries and especially his familiarity

with the region you are about to visit will be found useful towards the purpose of your mission."

Mr. Seward, Sec. of State, to Mr. F. W. Seward, Dec. 17, 1866, MS. Inst. Special Missions, II. 39.

A special appropriation for the secret service of the Department of State was obtained for the purposes of this mission and the carrying out of its design. (Bancroft's Seward, II. 486.)

"It appears not improbable that the Government of the Dominican Republic will be desirous at some not distant day of renewing these negotiations upon the basis of the propositions discussed with them a few weeks since at St. Domingo by the Assistant Secretary of State. The President, therefore, by the full power which is herewith transmitted to you, has authorized you to conclude a convention for the cession or lease of the territory and waters in question, should you find it practicable to do so. These instructions are the same in effect as those which were given to Mr. F. W. Seward."

Mr. F. W. Seward, Asst. Sec. of State, to Mr. Smith, commercial agent, Santo Domingo, Feb. 26, 1867, MS. Inst. Special Missions, II. 43.

"The President learns . . . with much regret that the Government of Dominica has not at the date mentioned [April 8, 1867] decided to negotiate with the United States for a cession or lease of the peninsula of Samana to be occupied as a naval station, a consummation of which it is conceived would be altogether as beneficial to the Republic of Dominica as it would be to the United States.

"There would be an inconvenience in leaving the proposals of this Government longer open to be accepted or rejected by the Government of Dominica. In the event, therefore, that when this dispatch shall come to your hands the Dominican Government shall not have decided to accept the proposal of the United States in one of the forms in which it is expressed, you will desist from further prosecution of the business, and will give notice to the President that the proposals of the United States are no longer in force."

Mr. Seward, Sec. of State, to Mr. Smith, May 8, 1867, MS. Inst. Special Missions, II. 54.

See, further, as to Samana Bay, Mr. Seward, Sec. of State, to Mr. Pujol, Jan. 10, Jan. 20, and Jan. 28, 1868, MS. Notes to Dom. Rep. I. 3, 19, 22; Mr. Fish, Sec. of State, to Mr. Bassett, Dec. 22, 1869, MS. Inst. Hayti, I. 172, saying: "Negotiations are pending between the United States and President Baez, of the Dominican Republic, relative to the Bay of Samana."

See, also, Mr. Evarts, Sec. of State, to Mr. Delmonte, Feb. 19, 1880, MS. Notes to Dom. Rep. I. 41; Mr. Blaine, Sec. of State, to Mr. Durham, January 28, 1892, MS. Inst. Hayti, III. 229; Mr. Foster, Sec. State, to Mr. Geis, July 30, 1892, 187 MS. Dom. Let. 400.



## (7) ISLANDS OF CULEBRA AND CULEBRITA.

## § 122.

Mr. George Bancroft was instructed, in 1867, while proceeding as minister to Berlin, to go by way of Madrid and sound the Spanish Government as to the cession of the islands of Culebra and Culebrita, in the Spanish West Indies, to the United States as a naval station.<sup>a</sup> "The result of Mr. Bancroft's explorations was so discouraging that the subject was peremptorily dropped."<sup>b</sup>

## (8) DANISH WEST INDIES.

## § 123.

"The first negotiations of the United States for the purchase of the Danish Islands were begun by Mr. Seward, then Secretary of State, in January, 1865, at least so it is supposed. There is mention in contemporary pamphlets of a dinner party at the French embassy, where Mr. Seward first expressed to General Raasloff, the Danish chargé d'affaires, the desire of the United States to buy the Danish Islands in the Antilles. Afterwards other conferences followed of an unofficial character, Mr. Seward urging the Danish minister, who replied that Denmark had no desire to sell the islands. Great secrecy was insisted upon and preserved. This was under the Presidency of Lincoln. General Raasloff, who was himself opposed to the sale, reported these interviews to his Government, who replied that it would be advisable to drop the negotiations, as the Danish Government had no desire to part with these colonies. Mr. Seward's carriage accident, consequent illness, and temporary incapacity for public affairs confirmed this attitude on the part of Denmark.

"In April came the assassination of the President, the wounding of Mr. Seward, and the accession of Mr. Johnson to the Chief Executive. Mr. Seward's recovery was slow, and it was not until December, 1865, on the eve of his departure for the South, a journey taken to restore his health, that the Secretary of State again mentioned the matter to General Raasloff. The complexion of affairs was now somewhat altered. A new ministry had come into power at Copenhagen, and it was less opposed to the sale than the former one had been. Hence, a note to Mr. Seward declaring that although the Government had no desire to sell, still it was not unwilling to entertain the Secretary's propositions.

<sup>a</sup> Mr. Seward, Sec. of State, to Mr. Bancroft, min. to Prussia, May 29, 1867, MS. Inst. Prussia, XIV. 465; Mr. Seward, Sec. of State, to Mr. Hale, min. to Spain, May 29, 1867, MS. Inst. Spain, XVI. 593; Mr. Seward, Sec. of State, to Mr. Bancroft, min. to Prussia, August 8, 1867, MS. Inst. Prussia, XIV. 477.

<sup>b</sup> Mr. Seward, Sec. of State, to Mr. Adams, min. to England, October 28, 1867, MS. Inst. Gr. Br., XXI. 286. The islands above referred to passed to the United States with Porto Rico and other Spanish islands in the West Indies under the treaty of December 10, 1898. See Knox, At.-Gen., Oct. 25, 1901, 23 op. 564.

A request was made that the United States declare how much it was willing to give.

“Mr. Seward departed, and during his absence visited St. Thomas and convinced himself of the necessity of the purchase.”

Report of Mr. Lodge, Committee on Foreign Relations, March 31, 1898, S. Doc. 284, 57 Cong. 1 sess. 18.

July 6, 1866, Mr. Seward wrote to the Secretary of War that it was “deemed desirable to ascertain officially and authentically the value to the United States, especially for military and naval purposes, of the Danish West India Islands, supposing that we should acquire a title to them.” It was therefore requested that an officer should be detailed to proceed thither for the purpose of examining and reporting upon the subject, or that such other measures should be adopted as might seem best to that end.<sup>a</sup>

Ten days later Mr. Seward officially proposed to General Raasloff, the Danish minister at Washington, a negotiation “for the purchase of the Danish Islands in the West Indies, namely, St. Thomas and the adjacent islets, Santa Cruz and St. John,” for \$5,000,000 in gold, payable in the United States, the “negotiation to be by treaty, which you will of course understand will require the constitutional ratification of the Senate.”<sup>b</sup>

General Raasloff soon afterwards returned to Denmark, where he became minister of war, and the negotiations were carried on at Copenhagen by Mr. Yeaman, United States minister at that capital, and Count Frijs, Danish minister of foreign affairs, and General Raasloff. In addition to written instructions transmitted in the usual course, telegraphic instructions were occasionally sent to Mr. Yeaman through Mr. Adams, then United States minister at London.<sup>c</sup>

<sup>a</sup>Mr. Seward, Sec. of State, to Mr. Stanton, July 6, 1866, MS. Inst. Special Missions, III. 137.

<sup>b</sup>Mr. Seward, Sec. of State, to Gen. Raaslof, July 17, 1866, MS. Notes, Danish Leg., VI. 337.

<sup>c</sup>“General Raasloff . . . after his arrival at Copenhagen . . . was appointed minister of war, and, in the work of reorganizing the Danish army, lost sight of affairs in America. Count Frijs, the Danish minister for foreign affairs, who consequently now had charge of the negotiations, was in favor of the sale, but still the affair dragged until January 19, 1867, when Mr. Yeaman, United States minister at Copenhagen, received the following telegram from Mr. Seward: ‘Tell Raasloff haste important.’ However, nothing was done for two months. Denmark felt a good deal of hesitation, owing to the uncertainty of the treaty being ratified by the Senate, but she became more assured by the absence of opposition in the United States to the purchase scheme and by the speedy ratification of the Alaska purchase treaty. Nevertheless, at the end of two months Mr. Seward telegraphed again to Mr. Yeaman: ‘Want yea or nay now.’ Mr. Yeaman at once communicated with General Raaslof, but it was not until the 17th of May, 1867, that Count Frijs made a counter proposition to Mr. Seward’s note.” (Report of Mr. Lodge, Com. on For. Rel., March 31, 1898, S. Doc. 284, 57 Cong. 1 sess.)

The difficulties in the way of the cession arose partly from sentiment, partly from the attitude of third powers, and partly from the question of price. The Danish cabinet at length decided to make a counter proposition to cede the three islands for \$15,000,000, or the islands of St. Thomas and St. John for \$10,000,000, in case France should refuse her consent to the transfer of Santa Cruz. It was also stated that the treaty must be ratified by the Rigsdag, and that the consent of the people of the islands must be obtained, and the request was made that the negotiations should be conducted at Copenhagen and not at Washington, as Mr. Seward had desired.<sup>a</sup>

Mr. Yeaman was duly instructed as to this proposition, and was furnished with full powers and a draft of a convention. The United States would pay \$7,500,000 for the three islands, and the treaty might be signed at Copenhagen; but no stipulation was to be admitted for a vote of the people of the islands, though a provision might be inserted allowing them two years in which to depart, if they preferred to retain their original allegiance. The treaty must be ratified by the Rigsdag before Aug. 4, 1867, and by the United States Senate before May, 1868, the ratifications to be exchanged at Washington.<sup>b</sup>

The Danish negotiators declared the consent of the people of the islands to be indispensable, and they declined to bind their Government to ratify the convention in advance of the United States. They offered, however, to take \$7,500,000 for St. Thomas and St. John, and half as much for Santa Cruz, should France consent to the sale of the latter.<sup>c</sup>

Mr. Yeaman was instructed to accept the offer of St. Thomas and St. John for \$7,500,000, but Mr. Seward, while urging that promptness was essential to the success of the negotiation and the acceptance of its results, refused to yield the point of the vote.<sup>d</sup> Indeed, as late

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<sup>a</sup>Mr. Yeaman to Mr. Seward, No. 65, April 30, 1867 (confidential); No. 67, May 17, 1867 (confidential); No. 69, May 27, 1867. The question raised as to the cession of Santa Cruz grew out of the provisions of Art. V. of the convention signed at Copenhagen June 15, 1733, by which France ceded the island to the Danish West Indies Company. That article translated reads as follows: "As His Most Christian Majesty has a particular interest that the said island shall not pass, under any title whatever, to other nations, the Danish company engages and obligates itself, in the most formal and authentic manner, neither to sell nor to cede it on any terms to any other nation without the approval and consent of His Most Christian Majesty." (De Clercq, *Recueil des Traités de la France*, XV. Supplément, 5. "Art. V. Comme S. M. T. C. a un intérêt particulier à ce que ladite isle ne passe point, à quelque titre que ce soit, à d'autres nations, la Compagnie danoise s'engage et s'oblige, en la manière la plus formelle et la plus authentique, à ne la vendre ni la céder en aucun tems à nulle autre nation, sans l'approbation et le consentement de S. M. T. C.")

<sup>b</sup>Mr. Seward, Sec. of State, to Mr. Yeaman, May 27, 1867, MSS. Inst. Denmark, XIV. 276; Mr. Yeaman to Mr. Seward, No. 73, June 7, 1867; No. 74, June 13, 1867; MSS. Dept. of State.

<sup>c</sup>Mr. Yeaman to Mr. Seward, No. 75, June 17, 1867, MSS. Dept. of State.

<sup>d</sup>Mr. Yeaman to Mr. Seward, No. 81, July 12, 1867; No. 84, July 22, 1867; Mr. Seward to Mr. Yeaman, Aug. 7, 1867; MSS. Dept. of State.

as Sept. 3, 1867, Mr. Seward insisted that "in no case must [the subject of the] vote be mentioned in [the] treaty," though he waived any objection to Denmark's taking a vote outside of the treaty.<sup>a</sup>

"I have the honor to acknowledge the receipt of your despatches of the 5th of September, No. 98, and of the 7th of September, No. 100.

"In regard to the notoriety which the negotiation to which you refer has attained, it is necessary to remember that the habits and practice of republican government always render even a temporary silence concerning important measures of policy suspicious and generally impossible. The press of all civilized nations, now universally employing the agency of the telegraph, has unavoidably and properly become a combination of great power, and is always more active in procuring facts which are involved in any uncertainty or mystery than in disseminating authentic information about which there is no effort at concealment. The difficulty which it was foreseen would attend the preservation of confidence between the two Governments in regard to the negotiations has been one of the strongest motives upon ~~our~~ part for urging speedy decision upon the Government of Denmark.

"As the case stands, it seems to me now more extraordinary that so little of the negotiations has transpired than it is that our proceedings have not remained altogether confidential.

"You mention in your 98 that you have reason to believe that the Danish Government now regret their having dissevered the proposition by assenting to sell St. Thomas and St. John, with the reservation of Santa Cruz. You inform me further that in your opinion the Danish Government would now much desire that their own proposition for the sale of the three islands should be reinstated and accepted. You assign the reasons upon which this opinion is founded, namely, that the relations of the Government with the inhabitants of the islands, with the people of Denmark, with the legislature of that country, and with France could be more successfully managed by making a cession of all than by a cession of the two islands of St. Thomas and St. John. Impressed with this opinion, you imply rather than express a recommendation that we shall open the question and accept the cession of the three islands upon the Danish terms.

"The President has at no time entertained a doubt that the division of our original proposition, so as to exclude Santa Cruz from the negotiation, would prove a hindrance in Denmark. He remains of the opinion that our proposition was well conceived, having reference to our situation at the time it was made. Circumstances, however, seem now to have changed. I leave out of view parallel negotiations in other quarters. In the purchase of Russian America, we have

<sup>a</sup> Mr. Seward to Mr. Yeaman, telegram, Sept. 3, 1867, MS. Inst. Denmark, XIV. 288.

invested a considerable capital and incurred the necessity for a large expenditure. The desire for the acquisition of foreign territory has sensibly abated. The delays which have attended the negotiation, notwithstanding our urgency, have contributed to still farther alleviate the national desire for enlargement of territory. In short, we have already come to value dollars more and dominion less.

“Under these circumstances, it would be more difficult now than it has heretofore been to accept the three islands at the price which is set upon them by the Government of Denmark. The best we could do now, would be to accept the two upon the terms which seem to have been agreed upon. I do not hesitate to say that procrastination of the negotiation, even for those two islands, may wear out the popular desire for even that measure of partial acquisition.

“The Danish negotiators have asked us to consider that the habits of Denmark are slow. Surely the statesmen of that country can well understand that on the contrary in the United States all political movements necessarily require vigor and promptitude.”

Mr. Seward, Sec. of State, to Mr. Yeaman, Sept. 23, 1867, MS. Inst. Denmark, XIV. 294.

In a confidential instruction to Mr. Yeaman of Sept. 28, 1867, Mr. Seward, referring to a communication which he had received directly from Gen. Raasloff, said: “We can not now modify our previous instructions without putting the negotiation in great jeopardy. Procrastination has abated an interest which was at its height when we came successfully out of a severe civil war. No absolute need for a naval station in the West Indies is now experienced. Nations are prone to postpone provision for distant contingencies. Besides, other and cheaper projects are widely regarded as feasible and equally or more advantageous. If, with reference to the present negotiation for the two islands, it is necessary or convenient to the Danish Government that there shall at the same time be pending a question of an ultimate transfer of a third island, let the Danish Government send us a protocol through your legation, to be dealt with as on consultation we shall find practicable and expedient.” (MS. Inst. Denmark, XIV. 297.)

October 5, 1867, Mr. Seward cabled Mr. Yeaman to waive the objection to a popular vote and to consent that one might be taken at the instance of Denmark. These instructions were reiterated by telegraph on the 24th of October, with a request to report progress.<sup>a</sup>

A convention for the cession of St. Thomas and St. John for \$7,500,000, with stipulations for a popular vote and for the admission of the inhabitants, in case of annexation, to the rights of citizens of the United States, was concluded at Copenhagen, Oct. 24, 1867.<sup>b</sup> The Russian minister at Copenhagen offered Mr. Yeaman his congratulations; the French minister said nothing; the Prussian minister observed

<sup>a</sup> Mr. Seward, Sec. of State, to Mr. Yeaman, Oct. 24, 1867, MS. Inst. Denmark, XIV. 300; same to same, Oct. 25, 1867, id. 301.

<sup>b</sup> Mr. Yeaman to Mr. Seward, Oct. 25, 1867; Mr. Seward to Mr. Yeaman, Oct. 26, Oct. 30, Oct. 31, and Nov. 15, 1867, MSS. Dept. of State, XIV. 304, 305, 307.

that it looked as if the United States expected soon to need great naval facilities, in which case the acquisition would be of great advantage; the British minister coupled with his felicitations a jesting remark about Greenland and Iceland; the Spanish minister, while congratulating Mr. Yeaman personally on the success of the negotiations, declared that, for himself and his Government, he did not like it.<sup>a</sup>

"A strong current of economical sentiment in regard to our finances has set in during the autumn, and it has since increased in volume and in force. West India accessions in harmony with the so-called Monroe doctrine, are still deemed important, but there is so strong a disposition to retrench that the treaty for St. Thomas and St. John is not unlikely to labor in the Senate just as the transaction itself has labored in the country.

"However illogical it may seem, public opinion has been much disturbed by the recent terrible displays of hurricanes and earthquakes in the lands and waters of the Virgin's Islands.

"These phenomena even brought confusion into the councils of Governor Carstensten, when he was proceeding to take the public vote of St. Thomas. He conceded delay; that delay is now a subject of inquiry and a cause of hesitation here.

"The lapse of time, however, always tranquilizes political excitement, just as it brings natural quiet after hurricanes, volcanoes, and earthquakes.

"I hear from St. Thomas that there is no doubt of a favorable vote there, on the 9th of January next."

Mr. Seward, Sec. of State, to Mr. Yeaman, Dec. 30, 1867, MS. Inst. Denmark XIV. 310.

Mr. Seward's reference to "economical sentiment" probably was suggested by a resolution of the House, declaring, on financial grounds, against further purchases of territory. (Bancroft's Seward, II. 485.)

The Rev. Charles Hawley, D. D., of Auburn, N. Y., was sent as a confidential agent to cooperate with the Danish authorities in taking the vote, while Rear-Admiral Palmer was directed to proceed in his flagship, the U. S. S. *Susquehanna*, to St. Thomas to await there the progress of events. (Mr. Seward, Sec. of State, to Mr. Hawley, Oct. 26, 1867, MS. Inst. Special Missions, III. 174; to Mr. Yeaman, Oct. 30 and Oct. 31, 1867, MS. Inst. Denmark, XIV. 304, 305.)

The vote in St. Thomas stood 1,039 to 22 for annexation; in St. John, 205 votes were cast, all for annexation. (Parton, "The Danish islands: are we bound in honor to pay for them?" 38-39.)

"The treaty of the cession of St. Thomas and St. John was submitted by the President, to the Senate, on the 3d day of December

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<sup>a</sup>Mr. Yeaman to Mr. Seward, Nov. 8, 1867, MSS. Dept. of State. Mr. Yeaman refers in this dispatch to the publication of the provisions of the treaty. See Mr. Seward to Mr. Yeaman, Oct. 31 and Nov. 15, 1867, approving the conduct of the negotiations; also, as to proposed supplemental articles, relating to Santa Cruz, Mr. Seward to Mr. Yeaman, Dec. 16 and Dec. 30, 1867, MS. Inst. Denmark, XIV. 374, 310.

last; the Senate were afterwards promptly advised by the President of the vote of the people of the islands in favor of annexation. Inasmuch as this is the so-called long session of Congress, no inference unfavorable to the success of the treaty can be drawn from the delay of its consideration in the Senate. On the 8th day of January instant, a special envoy of the Dominican Republic arrived here to inform us that that Government had reconsidered its rejection of our propositions for the purchase of Samana, and desired now to agree upon terms of cession. It was due to the Senate and to the country, to give a fair consideration to the Dominican proposition. That subject is therefore now under discussion in this Department. It is not unlikely that the Senate will prefer to wait for the result of my conferences with the Dominican minister before proceeding to a final consideration of the Danish treaty. Certainly the treaty for St. Thomas and St. John loses nothing in popular favor by a free examination upon its merits."

Mr. Seward, Sec. of State, to Mr. Yeaman, Jan. 29, 1868, MS. Inst. Denmark, XIV. 313.

"I have your private letter of the 2d of January, for which I give you my thanks. I should regret if you were disturbed by the reflections and criticisms concerning the progress of the negotiation for the Danish islands to which you allude. It may well be understood, once for all, that no new national policy, deliberately undertaken upon considerations of future advantage, ever finds universal favor when first announced. If it were otherwise, and if the public in every nation were so well informed as to be prepared to accept a policy of that sort immediately upon its announcement, it would be difficult to conceive what necessity there would be for statesmanship. In that case the nation would direct beforehand, and infallibly, in all cases what should be done, and what should be left undone. It is the great advantage of a free republic, that all important subjects are examined in all the lights, favorable and unfavorable, in which reason, interest, prejudice, and passion can place them.

"Certainly all that could be desired, and all that can be expected, is that decisions upon public questions shall be made within a reasonable time, be wisely made, and shall receive universal acquiescence. I am not aware that the Government of the United States, although it is rendered very complex by internal checks and balances, has failed at any time to act with not only as much wisdom but also with as much promptness in the conduct of its foreign affairs as other nations generally do.

"It is now seen that it was not necessary for Mr. Jefferson at any time during twelve years, to protest against hostile criticisms on the purchase of Louisiana. No one now thinks that the Government decided either rashly or unwisely in the acquisition of California.

The sharpness of criticism upon the acquisition of Alaska is manifestly abated already.

“The extension of the United States into the tropical seas is an affair scarcely less important than either of those. It would have been wonderful if it had escaped a searching popular investigation.”

Mr. Seward, Sec. of State, to Mr. Yeaman, Jan. 29, 1868, “private and confidential,” MS. Inst. Denmark, XIV. 315.

In an instruction to Mr. Yeaman, Jan. 2, 1868 (MS. Inst. Denmark, XIV. 312), Mr. Seward said: “It would not be becoming for me to entertain correspondence with a foreign state concerning incidental debates and resolutions in regard to the treaty for the two Danish islands, while it is undergoing constitutional consideration in the Senate and in Congress.”

Early in 1868 the treaty was ratified by the Government of Denmark, but, as it still remained under consideration in the Senate of the United States, the ratifications could not then be exchanged.

Mr. Seward, Sec. of State, to Mr. Yeaman, Feb. 20 and April 10, 1868, MS. Inst. Denmark, XIV. 317, 320; same to Mr. Bille, Feb. 20, 1868, MS. Notes, Danish Leg. VI. 243.

“Important domestic questions which have arisen at the close of the civil war and in a periodical political crisis have largely engrossed the attention of Congress and the country during the present year, to the exclusion of external policies. Owing to this cause, as it is believed, the House of Representatives has thus far delayed proceedings to fulfill the pecuniary conditions of the purchase of Alaska, which was effected with so much alacrity and unanimity in 1867. The Senate has delayed until the present moment the consideration of the treaty with Denmark for the acquisition of St. Thomas and St. John.

“Some other important treaties have been postponed. It is now manifest that the session of Congress is approaching its end. Judging from existing indications, I think the Danish treaty will be left for consideration until the next session of Congress, while the question upon the Alaska appropriation may be expected to be decided before the adjournment.

“During the recess of Congress, we shall be more able than we are now to collect the public sentiment in regard to the Danish treaty, and to consider whether any change in the form of the question is needful or desirable.”

Mr. Seward, Sec. of State, to Mr. Yeaman, June 29, 1868, MS. Inst. Denmark, XIV. 324.

Congress having adjourned in the summer of 1869 without action by the Senate upon the treaty, Mr. Seward proposed to the Danish minister at Washington the conclusion of an additional article extending the time for the exchange of ratifications one year.

Mr. Seward, Sec. of State, to Mr. Yeaman, No. 95, Aug. 17; No. 96, Aug. 17; and No. 98, Aug. 27, 1868, MS. Inst. Denmark, XIV. 329, 330, 331. In his No. 96, Mr. Seward said: “There is manifest in the public mind some-



thing of a reaction in favor of the recent treaty acquisitions of Alaska and St. Thomas, and for establishing reciprocal trade with the Sandwich Islands. I do not, however, find this reaction as yet sufficiently strong to justify an expectation that the addition of Santa Cruz, with an increase of the purchase money stipulated in our Danish treaty, would probably render it more acceptable to the Senate and Congress."

Such an article was signed at Washington, Oct. 15, 1868.

Mr. Seward, Sec. of State, to Mr. Bille, Oct. 15, 1868, MS. Notes to Danish Leg. VI. 249; Mr. Bille to Mr. Seward, Oct. 11, 1868, MSS. Dept. of State; Mr. Seward to Mr. Yeaman, Nov. 28, 1868, MS. Inst. Denmark, XIV. 336; Mr. Seward to Mr. Bille, Jan. 14, 1869, MS. Notes to Danish Leg. VI. 255.

By another article, concluded at Washington Oct. 14, 1869, the time for the exchange of ratifications was still further extended till April 14, 1870.

Mr. Fish, Sec. of State, to Mr. Bille, Sept. 25, 1869, MS. Notes to Danish Leg. VI. 277; same to same, Oct. 13, 1869, id. 279.

"I have the honor to acknowledge the receipt of your note of the 12th instant in which you refer to the stipulations of the treaty of October 24, 1867, between the United States and Denmark and more particularly to the additional article signed on the 14th day of October last, whereby the ratifications of the treaty were to be exchanged in Washington on or before this date. You inform me in this note that you are prepared to proceed to that exchange so soon as you shall be informed that it can be made.

"The term limited for the exchange expires this day. The Senate of the United States has not given its advice and consent to the treaty and I am not authorized to proceed further with reference thereto.

"In communicating this result of the withholding by the Senate of the United States of its advice and consent from the treaty referred to, I take leave to call your attention to the fact that in the note which my predecessor, Mr. Seward, addressed to his Excellency General Raasloff, under date July 17, 1866, Mr. Seward expressly indicated to General Raasloff that any treaty resulting from the negotiations inaugurated and begun by that note, would require the constitutional action thereupon of the Senate of the United States."

Mr. Fish, Sec. of State, to Mr. Bille, April 14, 1870, MS. Notes to Danish Leg. VI. 286.

Mr. Yeaman, with his dispatch No. 239, May 14, 1870, encloses a copy of a speech of Gen. Raasloff in the Rigsdag, explaining, on the ground of the failure of the treaty, his resignation from the Danish cabinet, as minister of war and the navy. He adverts to the fact that, after the ratification of the treaty by Denmark, he proceeded, at the request of his Government, to Washington, with a view to remove the difficulties which had arisen in the United States with regard to the treaty.

See Mr. Foster, Sec. of State, to Mr. Carr, Dec. 20, 1892, MS. Inst. Denmark, XV. 515; Mr. Wharton, Acting Sec. of State, to Sec. of Navy, Aug. 3, 1891, 182 MS. Dom. Let. 653.

"The treaty had no champion among the members of the Senate Committee on Foreign Affairs. . . . The Senate decided to lay the treaty on the table; . . . Johnson's term expired, and Hamilton Fish became Secretary of State before all hope of the treaty was abandoned. . . . In 1870 the Committee on Foreign Affairs reported unanimously against ratification, and the Senate seems to have given a unanimous acquiescence in that opinion." (Bancroft's *Seward*, II. 486, citing *Pierce's Sumner*, IV. 623, 329, 624.)

See, also, Schuyler's *Am. Dip.* 23; "The St. Thomas Treaty; a Series of Letters to the Boston Daily Advertiser," New York, 1869; Parton's *The Danish Islands*, Boston, 1869.

In a confidential dispatch of November 28, 1892, Mr. Carr, then minister of the United States at Copenhagen, stated that he was unofficially authorized to say that the Danish Government would favorably consider a proposal from the United States to revive the convention of 1867.<sup>a</sup> Mr. Foster, as Secretary of State, expressed appreciation of the friendly attitude of Denmark, but declared that, in view of the approaching end of the Administration then in power, the consideration of the subject at the moment was impracticable. He added, however, that the question of the acquisition of the islands was "one of far-reaching and national importance, the extent of which is appreciated by no one more than the President."<sup>b</sup>

A similar intimation as to the favorable disposition of Denmark was conveyed to the United States in 1896, and informal discussions took place at Copenhagen and in Washington.<sup>c</sup> January 24, 1902, a convention was signed at Washington by Mr. Hay, Secretary of State, and Mr. Brun, Danish minister, for the cession to the United States of "the islands of Saint Thomas, Saint John, and Sainte Croix, in the West Indies, with the adjacent islands and rocks," for the sum of \$5,000,000.<sup>d</sup> The convention was ratified by the United States Senate February 17, 1902. The treaty was approved by the lower house of the Danish Rigsdag; but, Oct. 21, 1902, the Landsting (the upper house) by a vote of 32 to 32 declined to ratify it.

(9) MOLE ST. NICOLAS.

### § 124.

"Successive Administrations have labored to secure a West Indian naval station. During the war of the rebellion the United States leased the harbor of St. Nicolas from Hayti for this purpose."

Report of Mr. Lodge, from the Committee on Foreign Relations, March 31, 1898, S. Doc. 284, 57 Cong. 1 sess. 19.

<sup>a</sup>S. Doc. 284, 57 Cong. 1 sess. 20.

<sup>b</sup>Mr. Foster, Sec. of State, to Mr. Carr, min. to Denmark, confidential, Dec. 20, 1892, S. Doc. 284 57 Cong. 1 sess. 22.

<sup>c</sup>S. Doc. 284, 5 Cong. 1 sess. 24-25.

<sup>d</sup>S. Doc. 284, 57 Cong. 1 sess. In this document will be found the report of Mr. Cullom, from the Committee on Foreign Relations, Feb. 5, 1902, in favor of the approval of the convention. See, also, as to the purchase of the islands and the alleged part of Captain Christmas in the transaction, report of Mr. Dalzell, from the Select Committee on Purchase of the Danish West Indies, July 1, 1902, H. Report 2749, 57 Cong. 1 sess.

In 1882, and again in 1884, while Mr. Frelinghuysen was Secretary of State, the United States declined to entertain a proposal from President Salomon, of Hayti, for the cession of a naval station in that country.<sup>a</sup> In 1891, however, Rear-Admiral Bancroft Gherardi, U. S. N., was sent as special commissioner to Hayti, to endeavor, in cooperation with the United States minister at Port-au-Prince, to obtain a lease to the United States of Mole St. Nicolas for that purpose.<sup>b</sup> The Haytian authorities objected to the form of the commissioners' powers.<sup>c</sup> This objection was removed by sending new powers; but the Haytian Government ultimately declined to entertain the American proposals.<sup>d</sup> The American minister reported that much excitement was caused in Hayti by the presence of the United States fleet at Port-au-Prince and by the negotiations for the lease of the Mole.<sup>e</sup>

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<sup>a</sup>Supra, § 100.

<sup>b</sup>Mr. Blaine, Sec. of State, to Adm. Gherardi, Jan. 1, 1891, MS. Inst. Hayti, III. 160; Mr. Blaine, Sec. of State, to Mr. Douglass, Jan. 1, 1891, MS. Inst. Hayti, III. 159; same to same, Feb. 12, 1891, id. 169.

<sup>c</sup>Mr. Blaine, Sec. of State, to Admiral Gherardi, Feb. 18, 1891, MS. Inst. Hayti, III. 171.

<sup>d</sup>Mr. Adee, Acting Sec. of State, to Mr. Douglass, May 20, 1891, MS. Inst. Hayti, III. 187, acknowledging the receipt of the latter's dispatch No. 164, of May 7, 1891; see, also, Mr. Blaine, Sec. of State, to Adm. Gherardi, Feb. 27, 1891, MS. Inst. Hayti, III. 172; Mr. Blaine, Sec. of State, to Mr. Douglass, Feb. 28, 1891, id. 173.

<sup>e</sup>Mr. Adee, Acting Sec. of State, to Mr. Douglass, May 19, 1891, MS. Inst. Hayti, III. 186, acknowledging the receipt of Mr. Douglass' No. 159, of May 2, 1891; "Haiti and the United States," by Mr. Douglass, N. Am. Rev., Sept. 1891, 337, and Oct., 1891, 450: The Haytian Question, by Verax, New York, 1891.

As to a coaling station in Peru, see Mr. Blaine, Sec. of State, to Mr. Hurlbut, min. to Peru, Nov. 22, 1881, and Dec. 3, 1881, For. Rel., 1881, 948, 955; Mr. Blaine, Sec. of State, to Mr. Hicks, min. to Peru, June 27, 1889, MS. Inst. Peru, XVII. 388; Mr. Blaine, Sec. of State, to Mr. Hicks, min. to Peru, tel., Dec. 4, 1889, MS. Inst. Peru, XVII. 399, saying: "Postpone consideration of coaling station until further advised."

The Department of State "has received no recent information as to the proposed sale of the Galapagos Islands by the Republic of Ecuador to Great Britain or to any other European power." (Report of Mr. Hay, Sec. of State, to the President, Dec. 13, 1899, S. Doc. 41, 56 Cong. 1 sess.)

See, generally, Mr. Frelinghuysen, Sec. of State, to Mr. Hall, min. to Cent. Am., April 7, 1884, 18 MS. Inst. Cent. Am. 374; Mr. Hay, Sec. of State, to Mr. Sampson, min. to Ecuador, April 22, 1899, MS. Inst. Ecuador, I. 569; same to same, Dec. 11, 1899, MS. Inst. Ecuador, II. 15; same to same, March 28, 1900, id. 34; Mr. Hay, Sec. of State, to Sec. of Navy, Aug. 1, 1900, 246 MS. Dom. Let. 653; Nov. 15, 1900, 246 MS. Dom. Let. 116; Jan. 18, 1901, MS. Dom. Let.

## CHAPTER V.

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I. *THE NATIONAL DOMAIN.*

§ 125.

“The territorial property of a state consists in the territory occupied by the state community and subjected to its sovereignty, and it comprises the whole area, whether of land or water, included within definite boundaries ascertained by occupation, prescription, or treaty, together with such inhabited or uninhabited lands as are considered to have become attendant on the ascertained territory through occupation or accretion, and, when such area abuts upon the sea, together with a certain margin of water.”

Hall Int. Law (4th ed.), § 30, p. 106; Scott's Cases on Int. Law, citing Bonfils-Fauchille, *Manuel de Droit Int.* (1894), §§ 482-519; Jellinek, *Das Recht des Modernen Staates*, I. 355-366; Jones, *Index to Legal Periodicals*, I. 545; Liszt, *Das Völkerrecht systematisch dargestellt* (1898), 71-83; Wheaton, Dana's ed. § 162.

As to occupation, see *supra*, §§ 80, 81. As to prescription, see *supra*, § 88. As to accretion, see *supra*, § 82. As to semi-sovereign states and protectorates, see *supra*, §§ 13, 14.

II. *TERRITORIAL LIMITS.*

1. *ARTIFICIAL LINES.*

§ 126.

Where a treaty provides that the boundary between two countries shall follow certain parallels of latitude, or certain straight lines running from point to point, which parallels and lines shall be surveyed and marked by commissioners upon the land, and, as agreed upon and established by the commissioners, shall in all time be faithfully respected, without any variation therein, unless by express and free consent of both countries, “the monuments placed by the commissioners, or the line as otherwise fixed by descriptive words referring to natural objects, or by the drawings and maps of the commissioners, would, it is plain, be conclusive in all time by force of the stipulations of the treaty. It would be the line agreed upon and established, even although it should afterwards appear that, by reason of error of astronomical observations or of calculation, it varied from the parallel of latitude where that was the line, or in the other part did not make exactly a straight line.”

Cushing, At.-Gen. (1856), 8 Op. 175-176, referring to the treaty between the United States and Mexico of December 30, 1853, 10 Stat. 1032.

See, as to an error in the “Old Line” between the United States and the British possessions, at Rouse's Point, Moore, *Int. Arbitrations*, I. 80, 112, 119, 129, 135-136, 149-153. In this case it is to be observed that provision was made by treaty for running the line, and that it was assumed that it had never been surveyed. (Moore, *Int. Arbitrations*, I. 70-71.)

By the treaty between the United States and Spain, concluded February 22, 1819, Article II., the boundary between the two countries, after following the western bank of the river Sabine from the sea to the thirty-second degree of north latitude, was to proceed by a certain course to the Rio Roxo, or Red River, and thence by that river westward "to the degree of longitude 100 west from London and 23 from Washington; . . . the whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818." By Article IV. the contracting parties, in order "to fix this line with more precision, and to place the landmarks which shall designate exactly the limits of both nations," agreed to appoint commissioners and surveyors "to run and mark the said line." It was held that, while Melish's map was adopted as the basis of the settlement, and was to have the same effect as if it had been expressly made a part of the treaty, yet, looking at the entire instrument, it was clear that the contracting parties intended, as shown by Article IV., that the line should be subsequently fixed with more precision, and that, in referring to the one hundredth meridian, they meant that meridian as astronomically located, and not necessarily as it appeared in the map, where it was in fact laid down far east of its true position.

United States *v.* Texas (1896), 162 U. S. 1. This case related to the territory sometimes called Greer County, which was claimed by Texas. It was held not to be within the limits of that State, but to be subject to the exclusive jurisdiction of the United States.

## 2. MOUNTAINS AND HILLS.

### § 127.

"Where a boundary follows mountains or hills, the water divide constitutes the frontier."

Hall, *Int. Law* (4th ed.), § 38, p. 127. This rule, while simple enough in principle, is often exceedingly difficult of application.

As to the question of the "Highlands," in the northeastern boundary between the United States and the British possessions, see Moore, *Int. Arbitrations*, I. 65-68, 78, 100, 109, 114, 131, 158-161.

As to the question between the watershed and highest mountain peaks, in the Argentine-Chilean boundary, see *Id.* V. 4854.

As to the case of a plateau, see the British-Portuguese arbitration concerning the boundaries of Manica land, *Id.* V. 4985 et seq.

## 3. RIVERS.

### (1) DIVISIONAL LINES.

### § 128.

"Where a navigable river forms the boundary of conterminous states, the middle of the channel—the *flum aquae* or thalweg—is generally taken as the line of their separation, the presumption



of law being that the right of navigation is common to them both. But this presumption may be rebutted or destroyed by actual proof of the exclusive title of one of the riparian proprietors to the entire river. Such title may have been acquired by prior occupancy, purchase, cession, treaty, or any one of the modes by which other public territory may be acquired. But where the river not only separates the conterminous states, but also their territorial jurisdictions, the thalweg, or middle channel, forms the line of separation through the bays and estuaries through which the waters of the river flow into the sea. As a general rule, this line runs through the middle of the deepest channel, although it may divide the river and its estuaries into two very unequal parts. But the deeper channel may be less suited, or totally unfit, for the purposes of navigation, in which case the dividing line would be in the middle of the one which is best suited and ordinarily used for that object. The division of the islands in the river and its bays would follow the same rule."

Halleck, Int. Law (Baker's ed.), I. 171. Hall observes: "Upon whatever grounds property in the entirety of a stream or lake is established, it would seem in all cases to carry with it a right to the opposite bank as accessory to the use of the stream, and perhaps it even gives a right to a sufficient margin for defensive or revenue purposes, when the title is derived from occupation, or from a treaty of which the object is to mark out a political frontier." See his discussion of this statement, with examples and distinctions. (Hall, Int. Law, 4th ed. 128-129.)

When a great river is the boundary between two nations or states, if the original property is in neither and there be no convention respecting it, each holds to the middle of the stream. But where a state which is the original proprietor grants the territory on one side only, it retains the river within its own domains, and the newly-erected state extends to the river only. In such case the low-water mark is its boundary, whether the fluctuations in the stream result from tides or from an annual rise and fall.

Handly v. Anthony, 5 Wheaton, 374.

In a disputed boundary case, in which a state was held to have ownership of soil and jurisdiction in the bed of a river, the bed of the river was defined to include "that portion of its soil *which is alternately covered and left bare as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn.*"

It was also held that in places where the bank was not defined, the

line must be continued up the river on the line of its bed, as defined above.

State of Alabama v. State of Georgia, 23 Howard, 505.

“When a navigable river constitutes the boundary between two independent states, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each state in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is, therefore, laid down in all the recognized treatises on international law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining states up to which each state will on its side exercise jurisdiction. In international law, therefore, and by the usage of European nations, the term ‘middle of the stream,’ as applied to a navigable river, is the same as the middle of the channel of such stream, and in that sense the terms are used in the treaty of peace between Great Britain, France, and Spain, concluded at Paris in 1763. By the language, ‘a line drawn along the middle of the river Mississippi from its source to the river Iberville,’ as there used, is meant along the middle of the channel of the river Mississippi. . . .

“The reason and necessity of the rule of international law as to the midchannel being the true boundary line of a navigable river separating independent states may not be as cogent in this country, where neighboring States are under the same General Government, as in Europe, yet the same rule will be held to obtain unless changed by statute or usage of so great a length of time as to have acquired the force of law.

“As we have stated, in international law and by the usage of European nations, the terms ‘middle of the stream’ and ‘midchannel’ of a navigable river are synonymous and interchangeably used. The enabling act of April 18, 1818, (3 Stat. 428, c. 67,) under which Illinois adopted a constitution and became a State and was admitted into the Union, made *the middle of the Mississippi River* the western boundary of the State. The enabling act of March 6, 1820, (3 Stat. c. 22, sec. 2, p. 545,) under which Missouri became a State and was admitted into the Union, made *the middle of the main channel of the Mississippi River* the eastern boundary, so far as its boundary was coterminous with the western boundary of Illinois. The enabling act of August 6, 1846, (9 Stat. 56, c. 89,) under which Wisconsin adopted a constitution and became a State and was admitted into the Union, gives the western boundary of that State, after reaching the river St. Croix, as follows: ‘Thence down the main channel of said river to the Mississippi, thence down the centre of the main channel

of that ' (Mississippi) ' river to the northwest corner of the State of Illinois.' The northwest corner of the State of Illinois must therefore be in the middle of the main channel of the river which forms a portion of its western boundary. It is very evident that these terms, ' middle of the Mississippi River,' and ' middle of the main channel of the Mississippi River,' and ' the centre of the main channel of that river,' as thus used, are synonymous. It is not at all likely that the Congress of the United States intended that those terms, as applied to the Mississippi River separating Illinois and Iowa, should have a different meaning when applied to the Mississippi River separating Illinois from Missouri or a different meaning when used as descriptive of a portion of the western boundary of Wisconsin. They were evidently used as signifying the same thing. . . . [The court here discussed *Dunlieth and Dubuque Bridge Co. v. County of Dubuque*, 55 Iowa, 558, 565, and *Buttenuth v. St. Louis Bridge Co.*, 123 Illinois, 535, 548.]

" The opinions in both of these cases are able and present, in the strongest terms, the different views as to the line of jurisdiction between neighboring States, separated by a navigable stream; but we are of opinion that the controlling consideration in this matter is that which preserves to each State equality in the right of navigation in the river. We therefore hold, in accordance with this view, that the true line in navigable rivers between the States of the Union which separates the jurisdiction of one from the other is the middle of the main channel of the river. Thus the jurisdiction of each State extends to the thread of the stream, that is, to the ' midchannel,' and, if there be several channels, to the middle of the principal one, or, rather, the one usually followed.

" It is therefore ordered, adjudged and declared that the boundary line between the State of Iowa and the State of Illinois is the middle of the main navigable channel of the Mississippi River."

*Iowa v. Illinois* (1893), 147 U. S. 1, 7-14, citing *Wheaton's Elements* (8th ed.), secs. 192 and 202; *Creasy, First Platform of Int. Law*, sec. 231, p. 222; *Halleck, Int. Law*, I. c. vi., sec. 23; *Woolsey, Int. Law*, § 62; *Phillimore, Int. Law*, I. 239.

See *Keokuk & Hamilton Bridge Co. v. Illinois* (1900), 175 U. S. 626, citing not only the above case, but also *Keokuk & Hamilton Bridge Co. v. The People*, 145 Illinois, 596, in which, said the court, " It was held that when the middle of a navigable river becomes the boundary line between two States, the middle of the current or channel of commerce will be regarded as the boundary line."

The report of commissioners appointed Feb. 3, 1896, 160 U. S. 688, to find and re-mark the line between Missouri and Iowa, is confirmed in *Missouri v. Iowa* (1897), 165 U. S. 118.

Where the boundary between two States (e. g. Illinois and Missouri) is " the middle of the main channel " of a river, the line

changes with the changes in the middle of the river's main channel, due to the gradual shifting of the soil.

*Bellefontaine Imp. Co. v. Niedringhaus* (1899), 181 Ill. 426, 55 N. E. 184; *McBaine v. Johnson*, 155 Mo. 191, 55 S. W. 1031; *Bonewits v. Wygant*, 75 Ind. 41.

The boundary between Illinois and Iowa is the middle of the main navigable channel of the Mississippi, and not the middle of the river bed. (*Keokuk & H. Bridge Co. v. People* (Ill.), 47 N. E. 313.)

For the confirmation of the report of the commissioners appointed to remark the boundary between Missouri and Iowa, see *State of Missouri v. State of Iowa*, 165 U. S. 118, 17 S. Ct. 290.

The boundary between Missouri and Nebraska in the vicinity of Island Precinct is the center line of the original channel of the Missouri River as it was before the avulsion of 1867 and not the center line of the channel since that time, although no water now flows through the original channel. (*Missouri v. Nebraska* (1904), 196 U. S. 23.)

As to the apportionment of accretions among riparian proprietors, see *Kehr v. Snyder*, 114 Ill. 313, 55 Am. Rep. 866.

Where A's land was bounded by a river, and B's land, which lay entirely under water and was acquired by patent from the State, was bounded by A's, it was held that accretions extending from the shore into the river belonged to A, while accretions forming in the river and extending toward the shore belonged to B. (*Linthicum v. Coan*, 64 Md. 439, 53 Am. Rep. 219; *S. P. Posey v. James*, 7 Lea (Tenn.), 98.)

Where tracts of land on opposite shores of a stream gradually come together, the line of contact becomes the dividing line. (*Buse v. Russell*, 86 Mo. 209.)

Where two nations are possessed of territory on opposite sides of a bay or navigable river, the sovereignty of each presumptively extends to the middle of the water from any part of their respective shores. But, where one nation first takes possession of the whole of the bay or navigable river, and exercises sovereignty thereon, the neighboring people shall nevertheless be "lords of their particular ports, and so much of the sea or navigable river as the convenient access to the shore requires."

*Crittenden, At. Gen.* (1851), 5 Op. 412. As to the concurrent jurisdiction exercised by Minnesota and Wisconsin over the St. Croix River, see *Opsahl v. Judd*, 30 Minn. 126.

Grants of land bounded by fresh-water rivers, where the expressions designating the water line are general, confer the proprietorship on the grantee to the middle thread of the stream, and entitle him to accretions. This rule applies to a great public water course, like the Mississippi at St. Louis. The doctrine that on rivers "where the tide ebbs and flows" grants of land are bounded by ordinary high-water mark "has no application in this case;" nor does the size of the river alter the rule.

*Jones v. Soulard*, 24 Howard, 41. On these grounds it was held that the city of St. Louis, being bounded "by the Mississippi," extended to the middle of that river.

By the common law the title of owners of land bordering on rivers above the ebb and flow of the tide extended to the middle of the stream; below such ebb and flow it extended only to the ordinary high-water mark, the title to the land below that mark being in the Crown. The foundation of this rule was the fact that in England the ebb and flow of the tide constituted the essential test of navigability. In the United States, owing to the character of its streams, the rule of the ebb and flow of the tides is inapplicable, and the true test is found in the fact of navigability. This is the doctrine in many of the States, though in some of them the rule of the common law has been maintained. In the courts of the United States the rule of ebb and flow of the tide for determining navigability has been discarded since the case of *The Genesee Chief*, 12 Howard, 443, 455. What is described in *Barney v. Keokuk*, 94 U. S. 324, 338, as "the confusion of navigable with tide water, found in monuments of the common law," long prevailed in the United States, and for two generations excluded the admiralty jurisdiction from the great rivers and inland seas.

*Packer v. Bird* (1891), 137 U. S. 661.

An owner of lands on a navigable stream holds only to high-water mark and not to the middle of the stream.

*Wallace v. Driver*, 61 Ark. 429, 33 S. W. 641; *Perkins v. Adams* (Mo.) 33 S. W. 778. Low-water mark is the point to which the river recedes at its lowest stage; high-water mark is the line to which the river rises for periods sufficient to deprive the soil of vegetation and render it valueless for agriculture. (*Paine Lumber Co. v. United States*, 55 Fed. Rep. 854; *Carpenter v. Board of Comrs.* (Minn.), 56 Minn. 513, 58 N. W. 295.)

A mussel-bed over which the water ebbs and flows at every tide, and between which and the shore no water flows at low tide, is not an island, but belongs to the owner of the adjacent shore. (*King v. Young*, 76 Me. 76, 49 Am. Rep. 596.)

## (2) NAVIGATION.

### § 129.

It was said in *The Montello*, 20 Wall. 430, 439, that public navigable rivers were those that were "navigable in fact;" and that they were "navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of travel on water." And again (p. 442): "It is not, however, as Chief Justice Shaw said, 21 Pick. 344, 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and com-

monly useful to some purpose of trade or agriculture.'” These utterances in the case of *The Montello* related to the Fox River, in which there was an abundant flow of water and a general capacity for navigation along its entire length, so that, although it was at certain places obstructed by rapids and rocks, yet if those obstructions were overcome by canals and locks the stream could in its ordinary condition be used for general purposes of navigation. The Rio Grande within the limits of New Mexico is not such a stream. The ordinary flow of water is insufficient. Its use for any purposes of transportation has been and is exceptional and only in times of temporary high water. The mere fact that logs, poles, and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river.

United States v. Rio Grande Dam & Irrigation Co. (1899), 174 U. S. 690, 698-699.

A stream which can, in its natural state, be used, though not necessarily at all times, for the purposes of commerce in the transportation of merchandise is a public navigable river.

Walker v. Allen, 72 Ala. 456; Olive v. State, 86 Ala. 88; Morrison v. Coleman, 87 Ala. 655; Tennessee, etc., C. R. Co. v. Danforth, 20 So. Reporter, 502; Hodges v. Williams, 95 N. C. 331; Little Rock, &c., R. R. Co. v. Brooks, 39 Ark. 403, 43 Am. Rep. 277; Toledo L. S. Co. v. Erie Shooting Club, 90 Fed. Rep. 680; see also Cardwell v. Sacramento County, 79 Cal. 347, 21 Pac. Rep. 763; People v. Mill & Lumber Co., 107 Cal. 221; Buckl v. Cone, 25 Fla. 1, 6 So. Rep. 160; Axline v. Shaw, 35 Fla. 305; State v. Wabash Paper Co. (Ind.), 51 N. E. Rep. 949; Goodwill v. Bossier Police Jury, 38 La. An. 752; Burroughs v. Whitman, 59 Mich. 279; Smith v. Fonda, 64 Miss. 551; Concord Mfg. Co. v. Robertson, 66 N. H. 1; Buffalo Pipe Line Co. v. N. Y., Lake Erie, &c., R. R. Co., 10 Abb. N. Cas. 107, 116-121; Ten Eyck v. Town of Warwick, 75 Hun. 562, 27 N. Y. Supp. 536; Re State Reservation Comrs., 37 Hun. 537; State v. White Oak River Corporation, 111 N. C. 661, 16 S. E. Rep. 331; State v. Eason (N. C.), 19 S. E. Rep. 88; Jeremy v. Elwell, 5 Ohio Cir. Ct. R. 379; Shaw v. Oswego Iron Co., 10 Oregon 371, 45 Am. Rep. 146; Haines v. Hall, 17 Oregon, 165, 20 Pac. Rep., 831; Heyward v. Mining Co., 42 S. C. 138, 19 S. E. Rep. 963; Irwin v. Brown (Tenn.) 12 S. W. Rep. 340; Jones v. Johnson (Tex.), 25 S. W. 650; East Hoquiam Boom, &c., Co. v. Neeson (Wash.), 54 Pac. Rep. 1001; Falls Mfg. Co. v. Oconto River Imp. Co. (Wis.), 58 N. W. 257; Willow River Club v. Wade (Wis.), 76 N. W. 273; Bayzer v. McMillan Mill Co. (Ala.), 16 So. Rep. 923.

As to jurisdiction in the United States over navigable waters, see Henry, Adm. Jurisdiction, § 12.

The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream, but while this rule obtained in those States of the Union that have simply adopted the common law, each State may, within its do-

minions, change the rule and permit the appropriation of the flowing waters for such purposes as it deems wise. This power is, however, subject to two limitations: (1) That without specific authority of Congress a State can not destroy the right of the United States as the owner of lands on a stream to the continued flow of the water, so far, at least, as may be essential to the beneficial uses of the Government property, and (2) that the General Government possesses a paramount power to secure the uninterrupted navigability of all navigable streams within the limits of the United States. By acts of July 26, 1866, § 9, 14 Stat. 253 (Rev. Stat. § 2339), March 3, 1877, 19 Stat. 377, and March 3, 1891, 26 Stat. 1101, Congress recognized and assented to the appropriation of water in contravention of the common-law rule as to continuous flow, but did not release its control over the navigable streams of the country. By section 10 of the act of September 19, 1890, 26 Stat. 454, it is declared that "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters in respect of which the United States has jurisdiction, is hereby prohibited." The obvious meaning of this act was that no State should thereafter interfere with the navigability of a stream without the national assent, and by section 3 of the act of July 13, 1892, 27 Stat. 88, amending section 7 of the act of September 19, 1890, the erection of any structure in any navigable waters of the United States, without permission of the Secretary of War, in such manner as to obstruct or impair navigation, commerce, or anchorage therein is declared to be unlawful.

United States v. Rio Grande Dam & Irrigation Co. (1899), 174 U. S. 690.

Courts take judicial notice that certain rivers are navigable and others not so, since these are matters of general knowledge, but it does not follow that the particular place between its mouth and its source where a river ceases to be navigable is a matter of common knowledge, and this being so, the question is one to be determined by evidence.

United States v. Rio Grande Dam & Irrigation Co. (1899), 174 U. S. 690.

### (3) NATIONAL STREAMS.

#### § 130.

The question of the navigation of the Mississippi was the subject of consideration in the Continental Congress and of negotiation at Madrid during the American Revolution, Spain demanding the recognition of her claim to the exclusive navigation of the river as a necessary condition of aid to the United States in their struggle with Great Britain.<sup>a</sup>

**The Mississippi.**

<sup>a</sup> See Wharton, Dip. Cor. Am. Rev. VI. 951.

The treaty of peace between the United States and Great Britain of 1782-83 declared (Art. VIII.): "The navigation of the river Mississippi, from its source to the ocean, shall forever remain free and open to the subjects of Great Britain and the citizens of the United States."

In 1790 the diplomatic representative of the United States at Madrid was instructed to urge upon the Spanish Government the immediate opening of the river.<sup>a</sup>

In a report to the President of March 18, 1792, Mr. Jefferson, as Secretary of State, asserted the right of the United States to the free navigation of the Mississippi within the Spanish dominions on the ground (1) of the treaty of Paris of 1763, (2) of the treaty of peace with Great Britain of 1782-83, and (3) of "the law of nature and nations," a ground declared to be "still broader and more unquestionable" than either of the others. "The ocean," said Mr. Jefferson, "is free to all men, and their rivers to all their inhabitants. . . . Accordingly, in all tracts of country united under the same political society, we find this natural right universally acknowledged and protected by laying the navigable rivers open to all their inhabitants. When their rivers enter the limits of another society, if the right of the upper inhabitants to descend the stream is in any case obstructed, it is an act of force by a stronger society against a weaker, condemned by the judgment of mankind. . . . The Roman law, which, like other municipal laws, placed the navigation of their rivers on the footing of nature, as to their own citizens, by declaring them public (*flumina publica sunt, hoc est populi Romani*, Inst. 2, t. 1, § 2), declared also that the right to the use of the shores was incident to that of the water. Ibid. § § 1, 3, 4, 5."

Am. State Papers, For. Rel. I. 253, 254; Jefferson's Works, VII. 577, 580.

By the treaty of October 27, 1795, the King of Spain agreed (Art. IV.) that the navigation of the Mississippi should "be free only to his subjects and the citizens of the United States, unless he should extend this privilege to the subjects of other powers by special convention," and conceded (Art. XXII.) a right of deposit for merchandise at New Orleans.

Moore, Int. Arbitrations, II. 998; Adams, Hist. of the U. S. I. 348-349.

"The United States have a just claim to the use of the rivers which pass from their territories through the Floridas. They found their

<sup>a</sup> Mr. Jefferson, Sec. of State, to Mr. Carmichael, Aug. 2, 1790, Am. State Papers, For. Rel. I. 247.

See, also, Mr. Jefferson, Sec. of State, to Messrs. de Vlar and Jaudenes, Jan. 25 and Jan. 26, 1792, 4 MS. Am. Let. 349, 350.

See, as to negotiations of 1785-1788, Trescot, Dip. History, 43-50.



claim on like principles with those which supported their claim to the use of the Mississippi. If the length of these rivers be not in the same proportion with that of the Mississippi, the difference is balanced by the circumstance that both banks, in the former case, belong to the United States."

Mr. Madison, Sec. of State, to Messrs. Livingston and Monroe, ministers to France, March 2, 1803, *Annals of Congress*, 7 Cong. 2 sess. (1802-3) 1095, 1099. See, also, *id.* 1102-1104.

By the subsequent acquisition of Louisiana and the Floridas the United States established its uncontested dominion over the lower banks of the Mississippi as well as over the banks of the rivers referred to in the foregoing passage. The Mississippi thus ceased to be an international stream, and the right to control its navigation passed exclusively to the United States, unless indeed Great Britain could claim the right to navigate it under Article VIII. of the treaty of 1782-83. That right was, however, as it appears, conceded under a misapprehension and was afterwards abandoned. Article VIII. of the treaty of 1782-83 is to be read in connection with Article II. of the same treaty, relating to the boundary between the two countries. This boundary was to run, in one of its sections, from the most northwestern point of the Lake of the Woods "on a due west course to the river Mississippi," and thence by a line "to be drawn along the middle of the said river Mississippi," until it should intersect the thirty-first degree of north latitude. It was not long afterwards ascertained that a line drawn due west from the most northwestern point of the Lake of the Woods would not strike the Mississippi; and it was for this reason that provision was made for a joint survey of the country in that quarter by Article IV. of the Jay treaty, which recited that it was "uncertain whether the Mississippi extends so far to the northward as to be intersected by a line to be drawn due west from the Lake of the Woods, in the manner mentioned in the treaty of peace."

During the negotiations at Ghent the British commissioners endeavored to secure for their countrymen the retention of the right to navigate the Mississippi by making it the price of yielding to the United States the continuance of the privileges previously enjoyed by American fishermen under Article III. of the treaty of peace. The American commissioners were very desirous of preserving the fisheries, but were unwilling to give the equivalent demanded; and consequently the treaty of Ghent contained no mention either of the fisheries or of the navigation of the Mississippi, both subjects being postponed for future negotiations.

Moore, *International Arbitrations*, I. 705-707.

The particular question as to the continuance of the privileges in the fisheries was definitively settled in 1818 by a compromise. During the negotiations the British commissioners endeavored to revive the question of the navigation of the Mississippi, but the American commissioners refused to entertain it for the reason that it was then known that the stream was not at any point navigable within British jurisdiction. Indeed, the British commissioners at Ghent, when they asked for the free navigation of the river, coupled with their demand a stipulation for territorial access to the stream. The circumstances of the settlement of 1818 are briefly but clearly stated by Mr. Rush, one of the American negotiators, in the following passage:

"An attempt was made by the British plenipotentiaries to connect with this article, a clause securing to Great Britain access to the Mississippi, and the right to its navigation. They made a similar claim at Ghent, but withdrew it; and we declared that we could consent to no clause of that nature. Its omission having, in the end, been agreed to, that subject was also put at rest. Britain, under the treaty of 1783, had the right of navigating the Mississippi; but it was then the western boundary of the United States. Their northern boundary, by the same treaty, was to have been a line running due west from the most northwestern point of the Lake of the Woods to the Mississippi. It was afterwards ascertained that a line so drawn, would not strike the Mississippi; its head waters not being within British limits, as at first supposed. Hence, all reason for Britain to claim the right of navigating a river which touched no part of her dominions, ceased. The United States have claimed, in a subsequent negotiation, the right of navigating the St. Lawrence, from its sources to its mouth. The essential difference in the two cases, is, that *the upper waters of the St. Lawrence* flow through territory belonging to both countries, and form a natural outlet to the ocean for the inhabitants of several States of the American Union.

Memoranda of a Residence at the Court of London, pp. 404-405.

In 1876 the government of Canada, in a correspondence relating to the reciprocal equality, established by Article XXVII. of the Treaty of Washington of May 8, 1871, in the use of certain canals, complained that Canadian vessels could not enjoy the full benefit of navigating the Champlain Canal to its terminus, at Albany, since they were not allowed, although the bulk of their cargoes was for New York, to proceed down the Hudson River. The United States replied that the treaty did not grant to Canadian vessels the use of that river. In 1892, when the question was again suggested, the United States said: "The Hudson River is a natural waterway, rising and lying wholly within the territory of the United States, and in no sense an international water course to

which the riparian rules of international law are applicable. In the conferences which preceded the signature of the treaty of Washington, this question of the international right to navigate natural water courses belonging to adjacent states was fully considered, resulting in the stipulation of Article 26 for the equal use of the St. Lawrence, and the Yukon, Porcupine, and Stikine rivers, an engagement which fitly stands alone as the formal expression of a natural right, independently of the conventional rights created by other articles of that treaty. The use of the Hudson River does not appear to have been considered in this relation."

Mr. Foster, Sec. of State, to Sir J. Pouncefote, British min., Dec. 31, 1892, For. Rel. 1892, 335, 337.

A decree of the Ecuadorian Government requiring all vessels engaged in navigating the rivers of that country after Jan. 31, 1870, to be owned exclusively by Ecuadorians, was not considered, apart from any particular contract or treaty stipulation, "as exceeding the authority which every government possesses for the regulation of its internal commerce." (Mr. J. C. B. Davis, Assist. Sec. of State, to Mr. Weile, consul at Guayaquil, Feb. 26, 1870, 57 MS. Inst. Consuls, 205, acknowledging dispatch No. 24, Jan. 24, 1870.)

#### (4) INTERNATIONAL STREAMS.

### § 131.

Where a river forms the boundary between two countries, and the only access to the adjacent territories is through such river, the waters of the whole river must be considered as common to both nations, for all purposes of navigation, as a common highway. Hence the mere transit of a French vessel through the waters of a river which forms the boundary between the United States and the territory of a foreign state, for the purpose of proceeding to such territory, can not be taken to subject the vessel to penalties imposed by the United States upon French vessels for entering their territory.

The Apollon, 9 Wheaton, 362.

See Mr. Adams, Sec. of State, to Mr. Habersham, U. S. dist. attorney at Savannah, Nov. 21, 1821, 19 MS. Dom. Let. 211.

"I may be permitted to raise the query whether the fact that a tug in some part of its course into an American port passes on the other side of the dividing line of the Straits [of Fuca] is such a towing in whole or in part within or upon foreign waters as is contemplated by the exception in § 4370 of the Revised Statutes. The case of the Apollon, 9 Wheaton, 362, suggests at least that it might not be." (Mr. Wharton, Act. Sec. of State, to Sec. of Treasury, May 22, 1891, 182 MS. Dom. Let. 79.)

"By natural law," say the Institutes of Justinian, "the following things are common to all: The air, flowing water, and the sea. . . . All rivers and ports are public." ("Et quidem natural jure communia sunt omnium hæc: aer, aqua profluens et mare. . . . Flumina autem omnia et portus publica sunt." Institutes, Lib. II., tit. I., secs. 1-2.)

The "navigation of the Rhine, from the point where it becomes navigable unto the sea, and vice versa," was, by the **European rivers.** Peace of Paris of May 30, 1814, declared to be "free, so that it can be interdicted to no one;" and it was provided that at the congress to be held at Vienna "attention" should "be paid to the establishment of the principles according to which the duties to be raised by the states bordering on the Rhine may be regulated, in the mode most impartial and the most favorable to the commerce of all nations." And it was further stipulated that "the future congress, with a view to facilitate communication between nations, and continually to render them less strangers to each other," should "likewise examine and determine in what manner the above provisions can be extended to other rivers which in their navigable course separate or traverse different states."

By the treaty of Vienna of June 9, 1815, the powers whose states were "separated or traversed by the same navigable river" engaged "to regulate, by common consent, all that regards its navigation," and for this purpose to name commissioners who should adopt as the bases of their proceedings certain principles, the chief of which was that the navigation of such rivers, "along their whole course, . . . from the point where each of them becomes navigable to its mouth shall be entirely free, and shall not, in respect to commerce, be prohibited to any one," subject to regulations of police. In order to assure the application of this principle, articles were inserted expressly regulating in certain respects the free navigation of the Rhine; and it was provided that "the same freedom of navigation" should "be extended to the Necker, the Mayne, the Moselle, the Meuse, and the Scheldt, from the point where each of them becomes navigable to their mouths." And in order to "establish a perfect control" over the regulation of the navigation, and to "constitute an authority which may serve as a means of communication between the states of the Rhine upon all subjects relating to navigation," it was stipulated that a central commission should be appointed, consisting of delegates named by the various bordering states, which commission should regularly assemble at Mayence on the 1st of November in each year. Regulations for the navigation of the Moselle and the Meuse were to be drawn up by those members of the central commission whose governments should have possessions on the banks of those rivers.<sup>a</sup>

By the treaty between Austria and Russia of May 3, 1815, the navi-

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<sup>a</sup> Among the stipulations embodied in the treaty there was one to the effect that in the event of war breaking out among any of the states of the Rhine the collection of customs should "continue uninterrupted, without any obstacle being thrown in the way by either party," and that "vessels and persons employed by the custom-houses" should "enjoy all the rights of neutrality."

gation of the rivers and canals of the ancient kingdom of Poland was declared to be free "so as not to be interdicted to any inhabitant of the Polish provinces, subject to either the Russian or Austrian Government." It was agreed, however, that a tonnage duty should be levied for the purpose of maintaining the rivers and canals in question in a navigable state, and that commissioners should be appointed for the purpose of regulating this and other matters of navigation. Similar provisions were embodied in a treaty concluded on the same day between Prussia and Russia touching ancient Poland.

By the treaty between Prussia and Saxony of May 18, 1815, provision was made (Art. XVII.) for the creation of a commission to regulate the navigation of the Elbe, in accordance with the general principles adopted at the Congress of Vienna. By the treaty of June 23, 1821, between Austria, Denmark, Great Britain, Prussia, Saxony, Hanover, Mecklenburg-Schwerin, Anhalt-Bernburg, Coethen and Dessau, and Hamburg, "the navigation of the Elbe, from the point at which that river becomes navigable down to the open sea, and *vice versa* (as well in ascending as in descending)," was declared to be "entirely free with respect to commerce." To secure this end various stipulations were made, including a provision for the appointment of a commission of revision, whose members should be appointed by the bordering states, and whose object and powers should be "to watch over the due observance of the present convention; to form itself into a committee for the settlement of any differences which may arise between the states bordering on the river, and to determine upon the measures which by experience may be found to be necessary to the improvement of commerce and navigation."

A treaty between Austria, Modena, and Parma, of July 3, 1849, to which the Pope acceded February 12, 1850, declared the navigation of the Po to be free and open to all persons, and committed its regulation to a commission.<sup>a</sup>

By a treaty signed at Bucharest, December 3-15, 1866, between Austria, Russia, and the United Principalities of Moldavia and Wallachia, the navigation of the Pruth was declared to be free and open to all flags; and provision was made for a permanent mixed commission for the purpose of regulating such navigation.

The river Douro, by a treaty between Portugal and Spain of August 31, 1835, was declared to be free for the navigation of "the subjects of both Crowns." It was provided that navigation dues and the police of the river should be regulated by a mixed commission.

By Article V. of the treaty of Teschen, May 13, 1779, the rivers

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<sup>a</sup> The treaty of Vienna, June 9, 1815, Art. XCVI., provided that the general principles adopted by the Congress in regard to the navigation of rivers should apply to the Po, and that commissioners should be appointed by the states bordering on it to regulate all that concerned its navigation.

Danube, Inn, and Salza were declared to be common to the House of Austria and the Elector Palatine for the navigation of their subjects. These stipulations were confirmed as to the Salza and Saale by the treaty between Austria and Bavaria of April 14, 1816.

By Article XV. of the Peace of Paris of March 30, 1856, it was provided that the principles established by the Congress of Vienna for the regulation of the navigation of rivers which separate or traverse different states should in future apply to the Danube and its mouths, whose navigation was declared to be free, subject to police and quarantine regulations. With a view to carry out this arrangement it was stipulated (Art. XVI.) that a European commission, composed of one delegate each from Austria, France, Great Britain, Prussia, Russia, Sardinia, and Turkey, should be charged with the execution of works for clearing the mouths of the river and the adjacent seas from obstructions. By Article XVII. of the treaty, provision was made for the establishment of a permanent body, called the Danube River Commission, to be composed of delegates of Austria, Bavaria, Turkey, Wurtemberg, and the three Danubian principalities, for the purpose (1) of preparing regulations of navigation and river police, (2) of removing impediments to the application of the arrangements of the treaty of Vienna, (3) of causing necessary works to be executed along the whole course of the river, and (4) of keeping the mouths and adjacent seas in a navigable state after the dissolution of the European commission.

By the treaty of London of March 13, 1871, the existence of the European commission was extended to April 24, 1883. It was further provided that "the conditions of the reassembling of the riverain commission," established by Article XVII. of the treaty of Paris, should "be fixed by a previous understanding between the riverain powers, without prejudice to the clause relative to the three Danubian principalities," and that, so far as any modification of the article should be involved, it should "form the subject of a special convention between the cosignatory powers."

By the treaty of Berlin of July 13, 1878, in order to increase the guaranties of the free navigation of the Danube, it was provided (Art. LII.) that "all the fortresses and fortifications existing on the course of the river from the Iron Gates to its mouth" should "be razed and no new ones erected." It was also provided (Art. LIII.) that the European commission, on which Roumania was to have a representative, should be "maintained in its functions," and that it should thenceforth exercise them "as far as Galatz in complete independence of the territorial authorities." And it was further provided (Art. LIV.) that prior to the expiration of the term assigned for the duration of the European commission, the powers should "come to an understanding as to the prolongation of its powers, or the modifica-

tions which they may consider necessary to introduce," and (Art. LV.) that the regulations respecting the navigation, river police, and supervision from the Iron Gates to Galatz should be drawn up by the European commission, assisted by delegates of the riverain states, and placed in harmony with those issued for the river below Galatz.

In order to come to an understanding in regard to these last stipulations, a new treaty was concluded March 10, 1883, between Austria-Hungary, France, Germany, Great Britain, Italy, Russia, and Turkey. By this treaty the jurisdiction of the European commission was extended from Galatz to Ibraïla, and its powers were prolonged till April 24, 1904, and thereafter for successive terms of three years till a certain notice was given.

But, besides prolonging the existence of the European commission, the treaty also created a new commission, called the "Mixed Commission of the Danube," to consist of delegates of Austria-Hungary, Bulgaria, Roumania, and Servia, and a member of the European commission, for the purpose of superintending the execution of the regulations made for the navigation of the river. This commission is to endure as long as the European commission, to hold two sessions a year, and to make its decisions "by a majority of votes."

For the text of the treaties above cited, see Hertslet, *Map of Europe by Treaty*.

The rules of the Congress of Vienna were formulated under the influence of Baron Humboldt, who was a member of the committee on the navigation of rivers.

For a discussion of the rules of the Congress, see Flore, *Droit Int.* (ed. 1885, by Antoine), II. § 761; Hall, *Int. Law*, (4th ed.), 142 et seq.

See, generally, as to the navigation of rivers, Engelhardt's *Histoire du Droit Fluvial Conventionnel* (1889), and the same author's *Régime Conventionnel des Fleuves* (1879); Caratheodory, *Droit Int. concernant les grands Cours d'Eau* (1861), and the same author's *Das Stromgebletsrecht und die internationale Flussschiffahrt* (1887); Woolsey, *Int. Law*, § 62; Hall, *Int. Law* (4th ed.), 136.

As to the navigation of the Danube, see Mr. Uhl, Act. Sec. of State, to Mr. Crocker, Nov. 20, 1894, 199 MS. Dom. Let. 457, citing *Encyclopædia Britannica*, VI. 819; Treaties and other documents relating to the navigation of the Danube (Parl. Pap., 1856); Commercial No. 6 (1894); Further report on the improvements made in the navigation of the Danube, 1878-1893 (Parl. Pap.).

In 1823 a petition was presented to Congress by the inhabitants of **American rivers:** Franklin County, New York, asking that the right be **St. Lawrence.** secured to them of exporting their produce, chiefly lumber, through the St. Lawrence River to the Atlantic Ocean.<sup>a</sup>

Congress having reported favorably on the petition, Mr. John Quincy Adams, then Secretary of State, June 23, 1823, instructed Mr. Rush, United States minister at London, to bring the subject to the

<sup>a</sup> Schuyler, *American Diplomacy*, 282.

attention of the British Government. It appeared that the inhabitants of the United States had previously enjoyed, especially under the conditions of trade established by the Jay treaty, a certain use of the river for commercial purposes, but the continuance of this use was considered by the British Government, especially after the war of 1812, as a concession which might at any time be withdrawn; and it had in fact been restricted by certain imperial legislation. Mr. Adams stated that the right of the inhabitants of the United States to navigate the St. Lawrence to and from the ocean had never been discussed with the British Government, but that he had little doubt that it might be established upon the "general principles of the law of nature." The United States, declared Mr. Adams, was bound to maintain for the people of the Territory of Michigan and of the States of Illinois, Indiana, Ohio, Pennsylvania, New York, and Vermont "the natural right of communicating with the ocean, by the only outlet provided by nature, from the waters bordering upon their shores." He admitted that the possession of both the shores of the river and its mouth had been held to give the right of obstructing or interdicting its navigation to the people of other nations, inhabiting the upper banks; but he maintained that, while the exclusive right of "jurisdiction" over a river originated in the "social compact" and was "a right of sovereignty," the right of "navigating" the river was "a right of nature, preceding it in point of time, and which the sovereign right of one nation can not annihilate as belonging to the people of another." In support of this view he invoked the acts of the Congress of Vienna, declaring the navigation of various rivers to be "free to *all* nations."<sup>a</sup>

The British plenipotentiaries were willing to treat of this claim as a "concession," for which the United States must offer a full equivalent, but expressed the hope that the question of "right" would not even be advanced, since they considered the claim to be "equally novel and extraordinary." The views of each side were embodied in a formal protocol, and the question was then permitted temporarily to rest.<sup>b</sup>

The subject was revived two years later, when Mr. Gallatin was sent as minister to England. In his instructions dated June 19, 1826, Mr. Clay, who was then Secretary of State, maintained the claims of the United States both on the ground of the common right possessed by the two powers of navigating the Great Lakes, and also upon the ground of the law of nature. As a way connecting the Great Lakes and the ocean, Mr. Clay suggested that the St. Lawrence might be considered as a strait forming a link between the two bodies of water,

<sup>a</sup> Am. State Papers, For. Rel. VI. 757-758.

<sup>b</sup> Mr. Rush, min. to England, to Mr. Adams, Sec. of State, Aug. 12, 1824, Am. State Papers, For. Rel. VI. 769, 772.



both of which the inhabitants of the two countries possessed the right to navigate. But, if the channel of the St. Lawrence was to be considered as a river, he contended that the right of the United States to navigate it was "clearly and satisfactorily maintainable." He pointed out and explained the distinction between the claim of a right of way over land and of the right to navigate a stream of water, as well as the distinction, in point of free navigation, between a stream navigable only within the jurisdiction of one nation and a stream navigable within the dominions of two or more nations. The right of the inhabitants of the upper banks of a river to navigate it on their way to the sea, through the territories of another sovereign, he maintained as a natural right. "From the very nature of such a river," said Mr. Clay, "it must, in respect to its navigable uses, be considered as common to all the nations who inhabit its banks, as a free gift flowing from the bounty of Heaven, intended for all whose lots are cast upon its borders." He also appealed to the regulations of the Congress of Vienna, which should, he declared, "be regarded only as the spontaneous homage of man to the superior wisdom of the paramount Lawgiver of the Universe, by delivering His great works from the artificial shackles and selfish contrivances to which they have been arbitrarily and unjustly subjected."<sup>a</sup> Mr. Clay also referred to the practical inconveniences which might result if the United States should assume to restrict the use of channels of the river lying in American jurisdiction.<sup>b</sup>

The views of Mr. Clay were not accepted by the British Government, and the practical importance of the subject was for a time rendered less apparent by developments in the course of trade in the United States, following the opening of the Erie Canal.<sup>c</sup>

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<sup>a</sup> This passage is quoted by Englehardt on the title-page of his *Histoire du Droit Fluvial Conventionnel*.

<sup>b</sup> Mr. Clay, Sec. of State, to Mr. Gallatin, min. to England, June 19, 1826, Am. State Papers, For. Rel. VI. 762-767. See also, id. 767-769; Gallatin's Writings, II. 313, 348, 368, 372, 395, 403; Schuyler, *American Diplomacy*, 287-289; Phillimore, *Int. Law* (2nd ed.), I. 207; Field, *Int. Code*, § 55; Wharton, *Com. on Am. Law*, § 191; 19 Brit. & For. State Papers, 1088.

<sup>c</sup> In 1848 a communication was made to the British minister at Washington, acknowledging the "courtesy" of the British Government and of the governor-general of Canada, in permitting the "transfer, via the river St. Lawrence," of "two small schooners to replace the steamers *Jefferson* and *Dallas* lately withdrawn from the United States revenue service on lakes Erie and Ontario." (Mr. Toucey, Act. Sec. of State, to Mr. Crampton, Brit. min., Nov. 21, 1848, MS. Notes to Great Britain, VII. 190.)

In 1850 it was stated as a matter of public information that the Canadian government had announced its determination not to grant to American vessels the privilege of passing "through the river St. Lawrence to the Atlantic Ocean . . . during the pendency of the Canadian reciprocity bill which is now before Congress." (Mr. Clayton, Sec. of State, to Mr. Buel, M. C., April 12, 1850, 37 MS. Dom. Let. 504.)

By Article IV. of the reciprocity treaty of June 5, 1854, it was agreed that the inhabitants of the United States should have "the right to navigate the river St. Lawrence, and the canals in Canada used as the means of communicating between the Great Lakes and the Atlantic Ocean," as fully and freely as British subjects, subject only to the same tolls and assessments as the latter. The British Government reserved the right to suspend this privilege on notice to the United States, but it was agreed that the United States might in such case suspend, if it should think fit to do so, the operation, so far as the Province of Canada was concerned, of Article III. of the treaty, which provided for the reciprocal admission into the United States and the British possessions in North America of certain articles free of duty.

The treaty of 1854 was terminated March 17, 1866, pursuant to a notice given a year before under a resolution of Congress of January 18, 1865. President Grant, in his annual message of 1870, stated that an unfriendly disposition had "been manifested on the part of Canada in the maintenance of a claim of right to exclude the citizens of the United States from the navigation of the St. Lawrence." He drew attention to the fact that this river constituted "a natural outlet to the ocean for eight States, with an aggregate population of about 17,600,000 inhabitants, and with an aggregate tonnage of 661,367 tons upon the waters which discharge into it." He referred to the discussions of Mr. Adams and Mr. Clay as having "unanswerably demonstrated the natural right of the citizens of the United States to the navigation of the river," on principles acknowledged by the Congress of Vienna. This right did not exclude the right of the territorial sovereign to make regulations of police, but such regulations should be framed in a liberal spirit of comity, and to that end the United States was ready to enter into any reasonable arrangement which Great Britain might suggest. President Grant also referred to the opening of various rivers in Europe and America, and cited Phillimore to the effect that while Great Britain might ground her refusal to the United States of the free navigation of the St. Lawrence "upon strict law," it was equally difficult to deny that in so doing she "exercised harshly an extreme and hard law," and pursued a course "in glaring and discreditable inconsistency" with her conduct in respect to the navigation of the Mississippi.<sup>a</sup>

By Article XXVI. of the treaty of Washington of May 8, 1871, it was declared that the navigation of the river St. Lawrence, ascending and descending, from the 45th parallel of north latitude, where it ceases to form the boundary between the two countries,

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<sup>a</sup> See Phillimore, *Int. Law* (2nd ed.), I. 207.

"from, to, and into the sea, shall forever remain free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain, or of the Dominion of Canada, not inconsistent with such privilege of free navigation."

On the other hand, it was reciprocally provided that the navigation of the rivers Yukon, Porcupine, and Stikine, **Yukon, Porcupine, and Stikine.** ascending and descending, from, to, and into the sea, should "forever remain free and open for the purposes of commerce to the subjects of Her Britannic Majesty and to the citizens of the United States, subject to any laws and regulations of either country within its own territory, not inconsistent with such privilege of free navigation." This stipulation is understood to secure "the right of access and passage," but not "the right to share in the local traffic" between American or British ports, as the case may be.<sup>a</sup>

By Article XXVII. of the same treaty the British Government engaged to urge upon that of Canada to secure to the citizens of the United States the use of the Welland, St. Lawrence, and other canals in the Dominion on terms of equality with its inhabitants; and the United States engaged to grant to British subjects the use of the St. Clair Flats Canal on terms of equality with the inhabitants of the United States, and also to urge upon the State governments to secure to British subjects the use of the several State canals connected with the navigation of the lakes or rivers traversed by or contiguous to the boundary line between the possessions of the contracting parties, on terms of equality with the inhabitants of the United States.

In a note of November 23, 1874, the British minister at Washington stated that United States barges and other vessels, with or without cargo, clearing from ports on the Hudson River, were allowed to pass through the Chambly Canal to the St. Lawrence, and thence from Montreal through the Lachine Canal and through the canals on the Ottawa, to the city of Ottawa or any other destination.<sup>b</sup>

December 9, 1873, instructions were given to the United States collector of customs at Sitka, with a view to enable British vessels to enjoy the privilege of navigating the Yukon, Porcupine, and Stikine rivers.<sup>c</sup>

<sup>a</sup> Mr. Adee, Second Assist. Sec. of State, to Mr. Woodbury, Jan. 6, 1898, 224 MS. Dom. Let. 229.

<sup>b</sup> Mr. Cadwalader, Acting Sec. of State, to Sir Edward Thornton, British min., Aug. 19, 1876, MS. Notes to Great Britain, XVII. 211.

<sup>c</sup> Mr. Fish, Sec. of State, to Sir Edward Thornton, British min., Dec. 13, 1873, MS. Notes to Great Britain, XVI. 281, enclosing copy of a letter of the Secretary of the Treasury of Dec. 10, 1873, relating to the navigation of the Stikine River.

The navigation of the Stikine was the subject of further conferences between the two governments.\*

Regulations for the navigation of the Yukon and Porcupine rivers and their tributaries may be found in Treasury Department circular No. 24, February 2, 1898, while the navigation of those rivers between Dawson and Rampart forms the subject of Treasury Department circular No. 98, June 6, 1898. The Canadian regulations for the navigation of the Yukon in British territory by American vessels were set forth in Treasury Department circular No. 26, February 5, 1898. The United States regulations for the navigation of the Stikine River and its connecting rivers and lakes are embodied in Treasury Department circular No. 76, May 9, 1898.

By Article III. of the Webster-Ashburton treaty of August 9, 1842,

**St. John.** it is provided that the navigation of the St. John, where that river is declared to be the boundary between the United States and the British dominions, shall be free and open to both parties; that "all the produce of the forest, in logs, lumber, timber, boards, staves, or shingles, or of agriculture, not being manufactured, grown on any of those parts of the State of Maine watered by the river St. John, or by its tributaries, of which fact reasonable evidence shall, if required, be produced, shall have free access into and through the said river and its said tributaries, having their source within the State of Maine, to and from the seaport at the mouth of the said river St. John's, and to and around the falls of the said river, either by boats, rafts, or other conveyance; that when within the Province of New Brunswick the said produce shall be dealt with as if it were the produce of the said Province; that, in like manner, the inhabitants of the territory of the upper St. John, determined by this treaty to belong to Her Britannic Majesty, shall have free access to and through the river, for their produce, in those parts where the said river runs wholly through the State of Maine: provided, always, that this agreement shall give no right to either party to interfere with any regulations not inconsistent with the terms of this treaty which the governments, respectively, of Maine or of New Brunswick may make respecting the navigation of the said river, where both banks thereof shall belong to the same party."

May 16, 1844, Mr. Calhoun, Secretary of State, instructed Mr. Everett, then minister to England, to bring to the attention of Her Britannic Majesty's Government the fact that the legislature of New Brunswick had imposed an export duty of a shilling a ton on all timber shipped from any port in the province, the authorities of Maine contending that the duty contravened the provision of Article III. of the treaty of 1842 as to "free access" to the port at the mouth of the St.

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\* Mr. Evarts, Sec. of State, to Sir Edward Thornton, Brit. min., Oct. 16, 1878. MS. Notes to Great Britain, XVII. 615.

John for Maine lumber and produce. Lord Aberdeen on the 9th of December replied that it was no violation of the treaty, as American and Canadian articles were treated alike, the treaty providing that Maine lumber and produce should, "when within the Province of New Brunswick, be dealt with as if it were the produce of the said Province." Great Britain had, said Lord Aberdeen, given a liberal construction to this article by allowing the produce of Maine, when once brought within the province of New Brunswick, to be exported thence, and imported into England and the British possessions, on payment of the same duties as the produce of the province itself.<sup>a</sup>

It is to the timber or other produce of Maine, without regard to the nationality of the owner, that the treaty of 1842 secures unimpeded access to the ocean by the St. John.<sup>b</sup>

A complaint having been made by Mr. John Kilburn, a British subject, to the effect that he was called on to pay customs duties on his equipment required in the driving of logs on the St. John, the British ambassador at Washington subsequently conveyed to the Department of State a dispatch from the governor-general of Canada, expressing his high appreciation of the prompt action taken by the United States Treasury Department "to secure the observance of the Ashburton treaty."<sup>c</sup>

By Article XXXI. of the treaty of May 8, 1871, Great Britain engaged "to urge upon the Parliament of the Dominion of Canada and the legislature of New Brunswick that no export duty, or other duty, shall be levied on lumber or timber of any kind cut on that portion of American territory in the State of Maine watered by the river St. John and its tributaries, and floated down that river to the sea, when the same is shipped to the United States from the Province of New Brunswick."

March 19, 1875, the British minister at Washington was requested to furnish any information which he might be able to obtain in regard to a report that preparations were being made to construct a bridge

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<sup>a</sup> Br. and For. State Papers, LI. 934, 937.

<sup>b</sup> Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, min. to England, May 16, 1884, MS. Inst. Great Britain, XXVII. 201. "The instruction to Mr. Lowell . . . of May 16, 1884. . . was the last of a correspondence in relation to the obstruction of waterways in Canada. It was in reply to his No. 742 of March 18, 1884, which in turn was in response to the Department's No. 640 of July 25, 1883, on that subject. A copy of this instruction . . . will be found on pp. 445-447 of the volume of Foreign Relations for 1883. Mr. Lowell apparently made no reply to the Department's instruction of May 16, 1884." (Mr. Olney, Sec. of State, to Attorney-General, Dec. 5, 1895, 206 MS. Dom. Let. 316.)

<sup>c</sup> Mr. Olney, Sec. of State, to Sec. of Treasury, March 14, 1896, 208 MS. Dom. Let. 513, enclosing a note from the British ambassador of March 11, 1896.

across the St. John's on several piers about a mile below the Tobique River, which bridge, if constructed, would "impede navigation or make an obstruction in the river and prevent the free access into and through the St. John's of lumber and other articles, which is guaranteed by treaty provisions." The minister subsequently stated that at the point where the bridge was being constructed the river had a width of 550 feet at low water and nearly 900 at extreme high water; that the bridge had five spans of 160 feet each and a draw; that provision was made for the passage of rafts and logs and of such boats and steamers as frequented the river during the season of navigation; and that there was nothing in the location of the piers that would cause any obstruction to the navigation of the river.<sup>a</sup>

The legislature of the Province of New Brunswick, by an act of March 27, 1845, incorporated a company to erect and maintain a boom at Woodstock, at or near the mouth of the Meduxnieag River, a tributary of the St. John. By an amendatory act of April 8, 1874, apparently passed for the purpose of giving effect to the treaty of 1871, it was provided that "no boomage shall be chargeable by the said company for logs or other timber intended to be *driven into the St. John River.*"<sup>b</sup>

By Article II. of the treaty between the United States and Great Britain of June 15, 1846, with regard to limits westward of the Rocky Mountains, it is stipulated that from the point where the forty-ninth parallel of north latitude shall be found to intersect the great northern branch of the Columbia River "the navigation of the said branch shall be free and open to the Hudson's Bay Company, and to all British subjects trading with the same, to the point where the said branch meets the main stream of the Columbia, and thence down the said main stream to the ocean, with free access into and through the said river or rivers, it being understood that all the usual portages along the line thus described shall, in like manner, be free and open. In navigating the said river or rivers, British subjects, with their goods and produce, shall be treated on the same footing as citizens of the United States; it being, however, always understood that nothing in this article shall be construed as preventing or intended to prevent the Government of the United States from making any regulations respecting the navigation of the said river or rivers not inconsistent with the present treaty."

<sup>a</sup> Mr. Fish, Sec. of State, to Sir Edward Thornton, British min., March 19, 1875, MS. Notes to Great Britain, XVI. 535; Mr. Fish, Sec. of State, to the Hon. H. Hamlin, Oct. 29, 1875, 110 MS. Dom. Let. 376.

<sup>b</sup> Mr. Gresham, Sec. of State, to Mr. Hale, M. C., April 20, 1893, 191 MS. Dom. Let. 342. See, also, Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, min. to England, May 16, 1884, MS. Inst. Great Britain, XXVII. 201.

The treaty contains no stipulation with regard to the navigation of the river within British territory.

As to the claims of the Hudson's Bay Company, see Moore, *Int. Arbitrations*, I. 253, 262.

"On principle there is a great difference between the rights of the riparian population of the upper tributaries of a river and the riparian population of the river as it descends to the sea. To the former access to the sea is essential and can be had without any invasion of the rights of the latter. To the latter penetration into the territory of the former is not essential and may be productive of many embarrassments to the country which is thus explored.

"Trading in the latter case can only be with the inhabitants of the inland state. Trading in the former case is understood to be limited to trading beyond the sea. And hence it has been held in many cases in which the right of free egress to the sea by the inhabitants of the upper territory is given that this does not involve a right of free access to the interior by the inhabitants of the lower country."

Mr. Bayard, Sec. of State, to Mr. Lundy, July 25, 1885, 156 MS. Dom. Let. 358.

By Article VI. of the treaty of Guadalupe Hidalgo of February **Rio Grande** and 2, 1848. it was agreed that the vessels and citizens of **the Colorado.** the United States should in all time have "a free and uninterrupted passage by the Gulf of California, and by the river Colorado below its confluence with the Gila, to and from their possessions situated north of the boundary line" laid down in the treaty.

By Article VII. it was agreed that the navigation of the river Gila, and that part of the Rio Grande (Rio Bravo) lying below the southern boundary of New Mexico, where it formed the boundary between the two countries, should be "free and common to the vessels and citizens of both countries," and that neither should, without the consent of the other, "construct any work that may impede or interrupt, in whole or in part, the exercise of this right."

The territorial situation having been changed by the cession to the United States of the Mesilla Valley; by the treaty of December 30, 1853, it was stipulated by the same treaty (Art. IV.) that the vessels and citizens of the United States should continue to have free and uninterrupted passage by the Gulf of California and the river Colorado to and from their possessions north of the new boundary; and that the stipulations and restrictions of the treaty of Guadalupe Hidalgo as to the Rio Grande should remain in force only below latitude 31° 47' 30".

The provisional director of the Argentine Confederation, General La Plata, Parana, Uruguay, and navigation of the rivers Paraná and Uruguay to be open to the merchant vessels of all nations.<sup>a</sup> This privilege was confirmed by treaties with France, Great Britain, and the United States, all concluded July 10, 1853.<sup>b</sup> Dissatisfied with this policy, the State of Buenos Ayres, which had sought to control the commercial opportunities which the rivers afforded, protested against the treaties and withdrew from the Confederation. The treaty powers then determined "to bestow the moral weight and influence of diplomatic relations upon the Government which had been prompt to recognize the liberal commercial principles of the age."<sup>c</sup>

Paraguay, by a treaty of February 4, 1859, conceded "to the merchant flag of the citizens of the United States of America the free navigation of the River Paraguay as far as the dominions of the Empire of Brazil, and of the right side of the Parana throughout all its course belonging to the Republic."<sup>d</sup>

May 8, 1850, Mr. Clayton, as Secretary of State, addressed to the Secretary of the Navy a letter in which he stated that the Department of State had "for some time past had in contemplation certain measures for procuring for the citizens of the United States the navigation of the river Amazon and some of its tributaries." Referring to "the advantages to be anticipated from a free transit on that mighty river," Mr. Clayton requested that a ship of war be sent to explore the stream and its tributaries. If it should be deemed necessary to secure from the Brazilian Government a special permit for the purpose, Mr. Clayton stated that a copy of his letter in the hands of the commander of the ship would, when delivered to the United States minister at Rio de Janeiro, be regarded by the latter as an instruction to use every exertion to procure such a permit as well as any other facilities that might be deemed essential.<sup>e</sup>

A different plan, however, was afterwards adopted. On February 15, 1851, the Secretary of the Navy instructed Lieut. William L. Herndon, with the assistance of Passed Midshipman Lardner Gib-

<sup>a</sup> 42 Br. and For. State Papers, 1313. See, also, Mr. Webster, Sec. of State, to Mr. Miller, June 11, 1852, MS. Inst. Bolivia, I. 11; Schuyler, Am. Diplomacy, 319.

<sup>b</sup> 42 Br. and For. State Papers, 3, 718; 44 id. 1071.

<sup>c</sup> Mr. Cass, Sec. of State, to Mr. Lamar, Oct. 23, 1857, MS. Inst. Arg. Rep. XV. 113.

<sup>d</sup> See, as to the case of the *Water Witch* and the negotiation of the treaty of 1859, Moore, Int. Arbitration, II. 1487, 1493.

<sup>e</sup> Mr. Clayton, Sec. of State, to Mr. Preston, Sec. of Navy, May 8, 1850, 38 MS. Dom. Let. 21.



bon, to set out by land from the Pacific side of the continent and crossing the Cordilleras to explore the Amazon from its source to its mouth. This exploration was duly made. The report of Lieutenant Herndon, dated at Washington, January 26, 1853, was communicated by President Fillmore to Congress on the 9th of the following month, and was published in two volumes.<sup>a</sup>

On July 26, 1851, not long after Lieutenant Herndon set out from Lima on his expedition, Mr. J. Randolph Clay, then United States minister at that capital, concluded with the Government of Peru a treaty of friendship, commerce, and navigation, by Article X. of which it was agreed that citizens of the United States who might establish a line of steam vessels to navigate between the different ports of entry within the Peruvian territories should enjoy all the privileges and favors given to any other association or company whatsoever, and that the steam vessels of each contracting party should not be subjected in the ports of the other to any duties of tonnage or to any similar duties other than those paid by any other association or company. By Article III. most-favored-nation treatment was secured in both countries in matters of commerce and navigation.

As it evidently was the design of the United States, in its efforts to secure the free navigation of the Amazon, to obtain the support of the countries on the west coast of South America, in whose territories tributaries of the stream were found, the Government of Brazil took measures to counteract the movement. A minister was sent to Peru and Bolivia, and on October 23, 1851, a treaty was signed between Peru and Brazil by which it was agreed that the navigation of the Amazon "should belong exclusively to the respective States owning its banks," and that if a Brazilian company for steam navigation were formed Peru would grant it a yearly subsidy.<sup>b</sup>

Bolivia, by a decree of January 27, 1853, declared the waters of the navigable rivers which, flowing through the Bolivian territory, discharged themselves into the Amazon and the Plate, to be free to the commerce and navigation of all nations of the globe.<sup>c</sup>

April 15, 1853, the Government of Peru, moved by the representations of Mr. Clay, issued a decree by which the towns of Loreto and Nauto were made ports of entry, and the privileges given to Brazil were extended to all the most-favored nations. The Brazilian minister at Lima protested against this decree, and an envoy was sent by Brazil to New Granada, Ecuador, and Venezuela for the purpose of making treaties to close the Amazon to the United States, on the

<sup>a</sup> S. Ex. Doc. 36, 32 Cong. 2 sess.; H. Ex. Doc. 53, 33 Cong. 1 sess., parts 1 and 2.

<sup>b</sup> Schuyler, *American Diplomacy*, 330.

<sup>c</sup> 55 Br. and For. State Papers, 505.

ground that the navigation of the river "belonged of right exclusively to the nations owning its banks." On July 13, 1853, however, the Peruvian Government sent a circular to Brazil, New Granada, Ecuador, and Venezuela, inviting them to treat for the opening of the river.<sup>a</sup>

With the advent of the Administration of President Pierce the effort to obtain the opening of the Amazon was vigorously renewed by Mr. Marcy, as Secretary of State. On April 4, 1853, the Brazilian minister at Washington inquired concerning certain rumors of naval and commercial expeditions to the Amazon. Mr. Marcy, in a note of April 20, 1853, and again in a note of September 2, 1853, disclaimed any intention to use force. He stated, however, in his second note that, in his opinion, no means would be more certain to develop the vast resources of the Brazilian Empire "than the removal of unnecessary restrictions upon the navigation of the Amazon, and especially to the passage of vessels of the United States to and from the territories of Bolivia and Peru, by way of that river and its tributaries."<sup>b</sup>

"The most important object of your mission—an object to which you will devote your early and earnest efforts—is to secure the citizens of the United States the free use of the Amazon. There are several republics with which our countrymen have commercial intercourse situated on the upper waters and tributaries of that great river. With these states they would carry on an extensive trade were not our vessels excluded from approaching their internal ports by the selfish and unjustifiable policy of the Brazilian Government, which claims and has hitherto exercised the right to obstruct the trade of the countries bordering upon and contiguous to the Amazon with foreign nations through this great natural highway. The assumption and exercise of this right is not only injurious to the interests of the states on the navigable waters of the Amazon, but to all other nations wishing to use these waters for the purpose of commercial intercourse.

"This restricted policy which it is understood Brazil still persists in maintaining in regard to the navigable rivers passing through her territories is the relic of an age less enlightened than the present. The doctrine upon this subject is clearly presented in the following extract from Wheaton's *Elements of International Law*:

"Things of which the use is inexhaustible, such as the sea and running water (including, of course, navigable streams) cannot be so appropriated as to exclude others from using these elements in any manner which does not occasion a loss or inconvenience to the propri-

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<sup>a</sup> Schuyler, *American Diplomacy*, 332, 333.

<sup>b</sup> *Id.* 336.

etor. This is what is called an *innocent use*. Thus we have seen that the jurisdiction possessed by one nation over sounds, straits, and other arms of the sea leading through its own territory to that of another, or to other seas common to all nations, does not exclude others from the right of innocent passage through these communications.'

"The soundness of this principle cannot, I presume, be controverted by the Imperial Government of Brazil. It will not, therefore, it is believed, without denying rights to our citizens to which they are fairly entitled, longer withhold from them the use of the Amazon to carry on commercial intercourse with Ecuador, Peru and Bolivia, New Granada, and Venezuela. You will claim from it the renunciation of any authority she may have heretofore exercised to prevent the passage of the merchant vessels of the United States up and down that river in their legitimate commerce with any of these republics. You are instructed to claim for our citizens the use of this natural avenue of trade. This right is not derived from treaty stipulations—it is a natural one—as much so as that to navigate the ocean—the common highway of nations. By long usage it is subject to some restrictions imposed by nations through whose territories these navigable rivers pass. This right, however, to restrict or regulate commerce, carried to its utmost extent, does not give the power to exclude such rivers from the common use of nations. . . .

"We claim for this continent the same privileges which nearly forty years ago were arranged by common consent and have been ever since applicable to the navigable waters of Europe. The regulations adopted by the allied sovereigns at the Congress of Vienna in 1815 on this subject were but the recognition of the law of nations in regard to the use of navigable rivers passing through different realms."

Mr. Marcy, Sec. of State, to Mr. Trousdale, min. to Brazil, Aug. 8, 1853, MS. Inst. Brazil, XV. 215.

In a letter to a person who inquired whether, if he should send a vessel to Peru by way of the Amazon, the United States would protect him in the voyage, Mr. Marcy stated that, although the claims of Brazil as to the control of the Amazon were questioned, the United States could not "for a moment advise or countenance any adventurous infringement of them." He added that it was hoped that friendly negotiations would remove existing obstacles. (Mr. Marcy, Sec. of State, to Mr. Collins, July 5, 1853, 41 MS. Dom. Let. 441.)

The Brazilian Government made an unfavorable reply to the proposal of free navigation submitted by Mr. Trousdale under the instructions of Aug. 8, 1853. (Schuyler, Am. Diplomacy, 341-343.)

A copy of these instructions was sent to Mr. Green, United States minister to New Granada, with directions to present the subject to the Government of that country. Mr. Marcy observed that New Granada had not as yet adopted the policy of Peru and Bolivia in respect

to the introduction of foreign trade to her territory through the Amazon and its tributaries, and that her possession of ports on both oceans relieved her of the necessity of endeavoring to free that river from the restrictions imposed by Brazil; but he directed Mr. Green to impress upon the New Granadian Government "the decided advantages that would result to it, in common with other states, from the adoption of a liberal policy in respect to the free navigation of the Amazon." (Mr. Marcy, Sec. of State, to Mr. Green, min. to New Granada, Aug. 15, 1853, MS. Inst. Colombia, XV. 163.)

A copy of the instructions to Mr. Trousdale was also communicated to the chargé d'affaires of the United States in Bolivia. In communicating it Mr. Marcy said: "Various causes have influenced the United States to submit passively to the pretensions to the exclusive control exercised so illiberally by his Imperial Majesty over this mighty river [Amazon]. The ancient restrictive policy to which Brazil still obstinately adheres is in conflict with the spirit of the present enlightened age, which claims the free use of all the natural means of international communication, obviously designed by a wise Providence for the common benefit of all civilized nations." (Mr. Marcy, Sec. of State, to Mr. Dana, chargé d'affaires to Bolivia, Nov. 1, 1853, MS. Inst. Bolivia, I. 18.)

In an instruction to Mr. White, chargé d'affaires to Ecuador, enclosing a copy of the instructions to Mr. Trousdale, Mr. Marcy said: "The Republics of Venezuela, New Granada, Ecuador, Peru, and Bolivia are all interested in procuring the removal of the restrictions which now practically deprive them in a considerable degree of the advantages and resources of that portion of their respective territories which would be thereby [by the opening of the Amazon] opened to an extensive and profitable foreign commerce. . . . Bolivia and Peru have already taken steps for testing the extent to which the pretensions of Brazil may be maintained. . . . It would be well for you . . . to present to the Government the advantages that would accrue to Ecuador in following the example of Bolivia and Peru. For, when all of the five States whose fertile regions are watered by the Amazon and its tributaries shall have thrown open their rivers and ports to foreign commerce it is thought that Brazil will not be able long to withstand the moral power which will thus be arrayed against her selfish and restrictive policy. And I speak thus confidently as to the probable course of Ecuador, when this subject shall be directly presented to her attention, because Mr. Clay, our present minister at Lima, has already addressed the Ecuadorian minister in Peru upon this subject, and has received from him every encouragement to believe that the project is viewed not unfavorably by his Government." (Mr. Marcy, Sec. of State, to Mr. White, chargé d'affaires to Ecuador, Aug. 20, 1853, MS. Inst. Ecuador, I. 36.)

President Pierce, in his annual message of December, 1853, said: "Our minister at Brazil is instructed to obtain a relaxation of that policy and to use his efforts to induce the Brazilian Government to open to common use, under proper safeguards, this great natural highway for international trade."

For memorial of Lieut. Maury on the free navigation of the Amazon, see H. Mis. Doc. 22, 33 Cong. 1 sess.

See, as to the free navigation of rivers, H. Report 295, 31 Cong. 1 sess.

As to explorations of the Amoor River. see H. Ex. Doc. 98, 35 Cong. 1 sess.

By a decree of January 4, 1854, the Peruvian Government modified the decree of the previous April by restricting the use of the Amazon to Brazilians, subject to existing treaties. The treaty between Brazil and Peru of October 23, 1851, expired October 23, 1858, and a "fluvial convention" between the two powers was then signed, by which Peru was to have provisionally the navigation of the Amazon, paying only charges for lighting, pilotage, and police.<sup>a</sup> In 1862 the Peruvian Government gave notice of the termination of the treaty of July 26, 1851, which came to an end December 9, 1863.

Bolivia, however, concluded with the United States, May 13, 1858, a treaty of commerce and navigation, by Article XXVI. of which it was declared that, "in accordance with fixed principles of international law," Bolivia regarded "the rivers Amazon and La Plata, with their tributaries, as highways or channels open by nature for the commerce of all nations;" and that she invited commercial vessels of the United States and of all other nations "to navigate freely in any part of their courses which pertain to her, ascending those rivers to Bolivian ports and descending therefrom to the ocean, subject only to the conditions established by this treaty and to regulations sanctioned . . . by the national authorities of Bolivia, not inconsistent with the stipulations thereof." Further stipulations as to the navigation of the rivers in question were embodied in Article XXVII.<sup>b</sup>

The navigation of the Amazon was at length declared by the Government of Brazil, by a decree of December 7, 1866, to be open to vessels of all nations from September 7, 1867. This was followed by a regulatory decree of July 31, 1867. By these decrees the Amazon was declared to be open as far as Tabatinga, on the frontiers of Brazil; the river Tocantins, as far as Cameté; the Tapajoz, as far as Santarem; the Madeira, as far as Borba; the Negro, as far as Manaós; and the San Francisco, as far as Penedo.<sup>c</sup> By a decree of January 25, 1873, the right to navigate the Madeira was extended beyond Borba to Santo Antonio, its first fall.<sup>d</sup> In 1891 the State of Amazonas temporarily levied a transit tax on rubber shipped from Peru to the United States by the Amazon. The tax was admitted to be illegal under the constitution of Brazil.<sup>e</sup>

December 17, 1868, the President of Peru issued a decree declaring the navigation of all the rivers of that Republic to be "open to merchant vessels, whatever be their nationality."<sup>f</sup>

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<sup>a</sup> Dispatch of Mr. Clay, Min. to Peru, No. 477, Nov. 27, 1858, MSS. Dept. of State.

<sup>b</sup> See For. Rel. 1871, 41.

<sup>c</sup> 58 Br. & For. State Papers, 551, 552-567; Dip. Cor. 1867, II. 256, 257.

<sup>d</sup> For. Rel. 1899, 123.

<sup>e</sup> For. Rel. 1891, 40, 41, 43; 1893, 42.

<sup>f</sup> Schuyler, *American Diplomacy*, 343, 344, citing *Collection of Peruvian Treaties*, Lima, 1876, p. 115; Lawrence, Wheaton (ed. 1863), 363-365; *Collection of Oviédo*, VII. 108-134, and MSS. Dept. of State.

By a contract entered into in London on July 11, 1901, and approved by the Bolivian Congress on December 20, **The Acre question.** 1901, the Bolivian Government undertook to grant to an Anglo-American syndicate, which was incorporated under the title of "The Bolivian Syndicate of New York City," a concession of important rights, powers, and privileges, including powers of administration and government, in the whole of the territory of Acre, concerning the title to which a controversy was then pending with Brazil. In consequence the Brazilian Government, on August 8, 1902, suspended the free navigation of the Amazon so far as concerned the importation and exportation of merchandise to and from Bolivia. Against this the Governments of France, Germany, Great Britain, Switzerland, and the United States remonstrated as a measure injurious to their commerce with Bolivia. On February 20, 1903, the freedom of commercial transit in respect of Bolivia was restored, but the importation of war material into that country through the Brazilian rivers was prohibited till further notice. The position of Brazil was clearly set forth by Baron Rio-Branco, who had become minister of foreign relations in December, 1902, in a note to Mr. Seeger, United States consul-general in charge of the legation, of February 20, 1903, as follows:

"It was in 1866 that the Brazilian Government opened the Amazon to the merchant ships of all friendly nations; but of the affluents of that river which have their source in Bolivian territory or pass through it the only one to which it extended this liberty, and in fact the only one in Brazil which can serve Bolivian foreign commerce, was the Madeira, from its confluence to the port of Santo Antonio. The Purús, and therefore its tributary, the Aquiry, or Acre, never were open to international navigation. Brazil has always maintained that when a river passes through the territory of two or more states the freedom of navigation or of transit through the country of the main river depends on a prior agreement thereto with the country of the tributary river, an agreement which in its nature implies reciprocity.

"There has not been and there is not in force any treaty of commerce and navigation between Brazil and Bolivia, and free transit by Brazilian rivers for Bolivian foreign commerce was only a matter of tolerance on the part of Brazil. But since the Bolivian Government has thought to be able to transfer rights of a quasi-sovereign nature to a syndicate of foreigners of different nationalities, Americans and Europeans, a syndicate without international capacity, and which, by the way it is constituted and by the means it undertook to employ in Europe, clearly showed that it was conspiring against the so-called Monroe doctrine, and inasmuch as the same Government has besides

this conferred upon that syndicate the power of disposing at will of the navigation of the river Acre and its affluents, Brazil concluded it was her duty to make reprisals, and for that reason, in the absence of conventional law between the two parties, suspended the tolerance which has existed for some years.

"The situation which obligated the adoption of that expedient has now changed, and, therefore, since the Federal Government is desirous of attending as promptly as possible to the interests of commerce, it has by a decision of this date reestablished free transit on the Amazon for merchandise between Bolivia and the foreign countries; it has continued, however, to prohibit the importation to that country of war material by Brazilian rivers."

The syndicate was induced, by the payment by Brazil of a sum of money, to renounce all its rights and claims under the concession, and a *modus vivendi* was entered into between Brazil and Bolivia, pending the conclusion of a definitive treaty of settlement, which was signed at Petropolis, November 17, 1903. By this treaty all Bolivia's rights in the Acre territory were acquired by Brazil, and the latter's relations then became acute with Peru, the Government of which country also laid claims to the territory. Collisions took place not only between the Peruvian troops and the inhabitants of the territory, but also between the Peruvian and Brazilian forces: and in May, 1904, the Brazilian Government prohibited the transit of arms and munitions of war to Peru by way of the Amazon. By the treaty of commerce and navigation between Brazil and Peru of October 10, 1891, certain rules and regulations, in addition to those established for all nations in 1867, were agreed upon as to the navigation of that river. The Government of Brazil, however, maintained that these facilities were applicable only "to the innocent transit, and in no way to the passage of means of aggression and war, to be used against Brazil and her nationals." In regard to such passage, Baron Rio-Branco, in a note of May 16, 1904, declared that the conventional right of transit came into conflict "with the natural and absolute right which Brazil possesses to prevent and impede, as much as possible, future aggressions, which would disturb the peace still further. In resorting to this prohibition, the Brazilian Government makes use of the so-called right of self-preservation, which may be prudently resorted to before the employment of reprisals." In accordance with the prohibition thus ordered, the Brazilian Government caused to be removed from a steamer at Manaus certain cases of arms and ammunition shipped from Europe to Iquitos, but informed the Peruvian minister at Rio de Janeiro that the articles might be forwarded to their destination by some other route. The Peruvian minister protested both against the general prohibition and also against the interruption of the transit of the particular

cargo, declaring that the latter was intended for commercial and not for military purposes. On July 12, 1904, however, a protocol was signed by Baron Rio-Branco, on the part of Brazil, and by Señor Velarde, Peruvian minister at Rio de Janeiro, on the part of his Government, by which a *modus vivendi* was established with a view to the prevention of conflicts in the upper Juruá and upper Purús pending the effort of the two Governments to reach a final settlement by negotiation, or, in case such negotiation should fail, by other amicable methods. As the result of this amicable arrangement, the prohibition of the transit of arms to Peru by way of the Amazon was revoked.

It should be observed that the treaty of Petropolis of November 17, 1903, between Brazil and Bolivia, pledges perpetually "the most ample freedom of transit and river navigation to both countries," and secures to each country the right, in connection with such transit and navigation, to keep customs agents at certain ports of the other.

See For. Rel. 1903, 30-43; Brazil and Bolivia, Boundary Settlement, Treaty for the Exchange of Territories and other Compensations, signed at Petropolis November 17, 1903, together with the Report of Baron Rio-Branco, Minister for Foreign Relations of Brazil; Brazil and Peru, Boundary Question, by John Bassett Moore: New York, 1904; Col. W. C. Church, in The Geographical Journal, May, 1904, p. 612.

The Brazilian decrees of 1866-67 said nothing as to men-of-war.

In 1878, on the request of the American legation at Río, permission was granted for a United States man-of-war to ascend the Amazon as far as the mouth of the Madeira. In 1882 the Brazilian Government stated, in response to an inquiry of the British legation, that the ships of war of friendly powers might freely enter the maritime ports of the country, but that their right to enter river ports depended, in the absence of a convention to the contrary, upon a special concession in each case. In 1899 permission was granted by the Federal Government of Brazil for the U. S. S. *Wilmington* to ascend the Amazon on her way to Iquitos, in Peru, but in a discussion which subsequently arose as to the formalities necessary to be observed the Government stated that according to the rule in Brazil the commander of a foreign man-of-war before ascending the river must obtain a formal permission from the governor of Para on a written request made by the proper consul there.<sup>a</sup> "During the past summer two national ships of the United States have visited Brazilian ports on a friendly mission and been cordially received. The voyage of the *Wilmington* up the Amazon River gave rise to a passing misunderstanding, owing to confusion in obtaining permission to visit the

<sup>a</sup> For. Rel. 1899, 115, 117, 118, 119, 121, 123. See also For. Rel. 1900, 65.



interior and make surveys in the general interest of navigation, but the incident found a ready adjustment in harmony with the close relations of amity which this Government has always sedulously sought to cultivate with the commonwealths of the Western Continent.”<sup>a</sup>

The Government of Venezuela, by a decree of July 1, 1893, to take effect from December 31, 1893, closed the Macareo

**The Orinoco.**

and Pedernales channels of the Orinoco to vessels in foreign trade, leaving open the Boca Grande. By a decree of June 6, 1894, a violation of the regulations established by the previous decree was made punishable with a fine of 5,000 bolivars, while a recurrence of it subjected the vessel to severe penalties. The validity of the decree of July 1, 1893, was sustained by the high federal court, which, in its decision, declared—

1. That, according to universally admitted principles, every sovereign nation, in the exercise of dominion over the national territory and all persons therein, “may permit or prohibit foreigners to come into the country, and in the same manner may open or close its ports or rivers to foreign commerce, neither the other nations nor individual foreigners having any right to claim the opening or closure of such rivers and ports under the plea of injury to their interests.”

2. That in regard to “interior seas and rivers” this was the doctrine generally admitted, and that only “in the cases determined by the law of nations might it be exceptionally claimed that certain rivers and seas should be opened either to the commerce of the bordering states or to the general trade of all countries.”

3. That the decree in question, which “prohibited to foreign commerce the traffic or navigation of the channels Macareo and Pedernales, reserving both for the coasting trade, assigned the Boca Grande of the Orinoco to foreign navigation and commerce, and prohibited absolutely, without distinction of persons and nationalities, the transit through the remaining outlets and channels of the river,” was not equivalent to the closure of ports open to exterior commerce; nor did it “impede the navigation of the Orinoco, but only establishes certain regulations for doing so, it being of no concern to the nation what must be the shape or build of the vessels or their sailing conditions for the purpose of such traffic, these points concerning only those who intend trading with the country through the river channel mentioned.”

4. That, although the liberal spirit of comity endeavored to “extend and apply also to rivers the principle of a free sea, it is likewise true that in regard to inland waters, lakes, etc., the shores of which belong exclusively to one nation, no other nation may claim the right

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<sup>a</sup> President McKinley, annual message, Dec. 5, 1899.

to navigate these waters, and in proof thereof the liberty of navigating them is always the consequence of agreements or treaties between the nations, made in view of the reciprocal international interests and the mutual conveniences of the countries in reference to their prosperity and civilization."

5. That the decree therefore did "not violate in any way the principles and practice of the law of nations, but on the contrary complies with them and recognizes them in prohibiting to foreigners the navigation in certain parts of the Orinoco, because it specifies the outlets and channels on which traffic is not allowed them, and opens the Boca Grande as the only channel they may navigate, whilst the caños Macareo and Pedernales are reserved for the coasting trade."

The minister of the United States, October 25, 1894, was instructed "to urge upon the Venezuelan Government that as an act of friendliness to the United States, as well as in the interest of the commerce of the two countries, it reopen to ships of the United States the branches of the Orinoco now closed to them."

Señor Rojas, Venezuelan minister of foreign affairs, stated, December 1, 1894, that the decree of July 1, 1893, which was designed to prevent contraband trade, had been justified by results, and could not be annulled; but that the Government proposed at the proper time to establish near the Gulf of Paria a port for the transshipment of freight destined to places on the Orinoco, but arriving on vessels unable to enter the Boca Grande.

For the decree of July 1, 1893, see Mr. Partridge, min. to Venezuela, to Mr. Gresham, Sec. of State, July 10, 1893, For. Rel. 1893, 729; and for the decree of June 6, 1894, For. Rel. 1894, 794. For the decision of the high federal court, see For. Rel. 1894, 795, 798-799.

As to the case of John H. Dialogue & Son, and their steamer *Delta*, see For. Rel. 1893, 729, 735, 737, 740.

For the request for the opening of the closed mouths, as an act of friendliness, see Mr. Gresham, Sec. of State, to Mr. Haselton, min. to Venezuela, No. 12, Oct. 25, 1894, For. Rel. 1894, 800.

As to the reply of Señor Rojas, see Mr. Uhl, Acting Sec. of State, to Mr. Coombs, Feb. 25, 1895, 200 MS. Dom. Let. 658.

The text of a decree of the Venezuelan Government of May 14, 1869, and of a regulatory decree of July 1, 1869, opening the Orinoco and its affluents to merchant vessels under foreign flags, may be found in Moore, Int. Arbitrations, II. 1696. In August 1873, however, an exclusive right to navigate the same streams was granted to General Perez, of Caracas. (Moore, Int. Arbitrations, II. 1701; S. Ex. Doc. 139, 50 Cong. 1 sess. 32.)

By an executive decree of September 11, 1900, the Venezuelan Government suspended the use of the river Zulia, an affluent of the Orinoco, for commercial purposes. The Colombian legation at Caracas, by notes of September 28 and October 25, 1900, protested against

this decree as inflicting a grave injury on the provinces of the Department of Santandar, which had enjoyed, without interruption, the use of the river as a means of communication with the sea. The Venezuelan Government, by a note of November 3, 1900, defended the decree on the ground that it was necessary for preventing the consummation of projected revolutionary invasions and the supply of arms and other contraband articles to persons who were plotting against the peace of Venezuela. The right of Venezuela to close the navigation of the river was denied by the Colombian Government on general grounds as well as on grounds of immemorial right and treaty stipulations. By an executive decree of March 4, 1901, the Venezuelan Government stated that the commercial navigation of the river by bongos and canoes was allowed. The Colombian minister at Caracas stated in a dispatch to his Government, March 10, 1901, that merchants residing in Maracaibo, who were interested in the transit of the Zulia, had informed him that this permission was sufficient for the time being, since there was little water in the rivers and steamers could not navigate it.

Uribe, *Anales Diplomaticos y Consulares de Colombia* (1901), II. 268-289.

"A large part of Colombian territory being watered by navigable branches of the river Orinoco, has enabled the Republic to make use of this river as far as the open sea by any of its outlets, with no other obligations than those of observing the police laws that Venezuela might make for internal security and for the protection of her revenues.

"This right of Colombia has been confirmed still more now that the frontier limits have been decided, and it is admitted that the territory of our country extends as far as the left bank of the Orinoco. The river there having become international, its navigation is free to both countries."

Report of the Colombian minister of foreign affairs, 1894, *For. Rel.* 1894, 200.

With reference to an attack made on the American steamer *Antioquia* on the Magdalena River, March 9, 1864, Señor Dr. Antonio del Neal, Colombian minister of foreign affairs, in a note to Mr. Burton, United States minister, of February 16, 1865, said: "Orders have also been renewed to the States of Bolivar, Magdalena, Antioquia, and Tolima, requiring of their respective authorities the strictest compliance with the law of May 24, 1856, and the amendment thereto of May 25, 1864, forbidding their interference in the navigation of the Magdalena River, in consequence of all that relates to the navigation of the rivers of the Republic which touch the territory of two

or more States, or of an adjoining nation, being under the exclusive control of the General Government."<sup>a</sup>

The law of May 25, 1864,<sup>b</sup> refers to clause 6, article 17, of the constitution of the United States of Colombia of May 8, 1863, which declares the exclusive competency of the General Government to extend to "the regulation of such interoceanic communications as exist or may be opened in the territory of the Union, and the navigation of the rivers which water the territory of more than one State or flow on to that of a neighboring nation."

By the general act of Berlin of Feb. 26, 1885, Art. II., all flags  
**African Rivers:** have free access to the Congo and its affluents,  
**Congo and Ni-** including the lakes, as well as to any canals that  
**ger.** may be constructed to unite the water courses or  
 lakes within the territories of the state.

The same treaty guarantees the free navigation of the Niger and its branches.

Independent State of the Congo, S. Ex. Doc. 196, 49 Cong., 1 sess. 298, 300, 303; Schuyler, Am. Dip. 364.

By a decree of the sovereign of the Independent State of the Congo of April 30, 1887, every private vessel navigating the river beyond the falls of Leopoldville was required to hoist at the stern the flag of that state, although she was permitted also to hoist the flag of her own country, if she possessed ship's papers establishing her foreign nationality. The United States objected to this requirement, but it was defended by the Congo State. In the correspondence it was agreed that the Congo River was open to the flags of all governments, whether such governments were parties to the general act of Berlin or not. (For. Rel. 1888, I. 27 et seq. See, also, Mr. Bayard, Sec. of State, to Mr. Tree, min. to Belgium, March 9, 1888, MS. Inst. Belg. II. 481.)

In 1888 the Persian Government announced that it had decided,  
**Persian river—** with a view to extend the commerce of the Empire  
**Karun.** and promote the agriculture of Kurdistan and Ahwaz, to permit merchant steamers of all nations to exercise the privilege, which had previously been confined to sailing vessels, of transporting goods in the river Karun from Mohammera to the dyke at Ahwaz, on condition (1) that they should not pass above that dyke, the navigation of the river above that point being reserved exclusively to sailing vessels and steamers of the Persian Government and of its subjects; (2) that they should pay the passage dues fixed by the Persian Government at Mohammera; and (3) that they

<sup>a</sup> See dispatch from Mr. Burton, min. to Colombia, to Mr. Seward, Sec. of State, No. 174, May 14, 1860, MSS. Dept. of State.

<sup>b</sup> 61 Brit. & For. State Pap. 140.

<sup>c</sup> 53 Id. 290.

should not carry merchandise prohibited by the Persian Government nor remain longer in the river than was necessary for the loading and unloading of merchandise.

Mr. Pratt, min. to Persia, to Mr. Bayard, Sec. of State, No. 312, Nov. 5, 1888, enclosing translation of a communication of the Persian minister for foreign affairs of 24 Sefar 1306, MSS. Dept. of State.

(5) DIVERSION OF WATERS.

§ 132.

June 12, 1880, Mr. Evarts enclosed to the United States legation in  
**Case of the Rio Mexico** a copy of a letter from the governor of Texas  
**Grande.** and of its various enclosures, invoking the interposition of the United States in a matter stated to be of vital importance to the citizens of Texas living on the eastern shore of the Rio Grande. The substance of the complaint was that Mexicans engaged in agricultural pursuits on the Mexican shore of the river were in the habit of diverting the water during the dry season into their ditches, thereby preventing the citizens of Texas from getting sufficient water to irrigate their crops. "This," said Mr. Evarts, "if true, would be in direct opposition to the recognized rights of riparian owners, and, if persisted in, must result in disaster and ruin to our farming population on the line of the Rio Grande, and might eventually, if not amicably adjusted through the medium of diplomatic intervention, be productive of constant strife and breaches of the peace between the inhabitants of either shore." The subject was also brought to the attention of the Mexican minister at Washington. The receipt of Mr. Evarts's communication was duly acknowledged, but no further correspondence appears to have taken place.

For. Rel. 1880, 752-755, 784; Mr. Olney, Sec. of State, to At.-Gen., Dec. 5, 1895, 206 MS. Dom. Let. 316.

The statement in the letter to the Attorney-General of Dec. 5, 1895, here cited, that no further correspondence appears to have taken place, may be modified to this extent: After more than four years' delay, the Mexican legation presented a reply to the effect that the scarcity of water in 1880 was due, not to diversion, but to the dry season; that the Mexicans in fact suffered more than the Texans; that the scarcity was aggravated by the waste of water on the American side, in Colorado and New Mexico; and that, while there was a dam at Paso del Norte, Mexico, it had been in existence more than 300 years, being as old as the town itself, and no additions had lately been made to it. (Mr. Romero, Mex. min., to Mr. Frelinghuysen, Sec. of State, Aug. 27, 1884, 34 MS. Notes from Mex. Leg.)

By a note of October 21, 1895, the Mexican minister complained that, in consequence of the digging of irrigation trenches in parts of Colorado and New Mexico through which the Upper Rio Grande and

its affluents flow, the water in the river had been so greatly diminished as to create a scarcity in the lower part of the stream, to the great damage and hardship of numerous inhabitants of Mexico. This was represented as a violation both of the principles of international law and of Article VII. of the treaty of Guadalupe Hidalgo of February 2, 1848. It was advised—

1. That the rules of international law imposed upon the United States no duty to deny to its inhabitants the use of the water of that part of the Rio Grande lying wholly within the United States, although such use resulted in reducing the volume of water in the river below the point where it ceased to be entirely within the United States, the supposition of the existence of such a duty being inconsistent with the sovereign jurisdiction of the United States over the national domain.

2. That Article VII. of the treaty of Guadalupe Hidalgo, although it prohibited "any work that may impede or interrupt, in whole or in part," the exercise of the right of navigation, was limited in terms to "the part of the Rio Bravo del Norte lying below the southern boundary of New Mexico," while Article IV. of the treaty of December 30, 1853, continued in force the provisions of Article VII. "only so far as regards Rio Bravo del Norte below the initial of said boundary provided in the first article of this treaty."

Harmon, At-Gen., Dec. 12, 1895, 21 Op. 274. The Attorney-General, in concluding his opinion, said: "The case presented is a novel one. Whether the circumstances make it possible or proper to take any action from considerations of comity is a question which does not pertain to this Department; but that question should be decided as one of policy only, because, in my opinion, the rules, principles, and precedents of international law impose no liability or obligation upon the United States." (21 Op. 283.)

August 4, 1896, the Mexican Minister at Washington presented to the Department of State a petition from Mexican citizens in and about Paso del Norte, Mexico, protesting against the immoderate use of waters of the Rio Grande and its tributaries by residents of New Mexico and Colorado. The Mexican minister called attention to Article VII. of the treaty of February 2, 1848; to the last clause of Article I. of the treaty of December 30, 1853; to Article III. of the convention of November 12, 1884, and to Article V. of the convention of March 1, 1889; and, on the strength of these stipulations, asked the United States Government to prevent the erection and operation by a company known to the complainants as the "Rio Grande Irrigation Company (Limited)," at Elephant Butte, in New Mexico, about 125 miles above Paso del Norte, of a dam designed to store all the surplus waters of the river and turn it into irrigation ditches and canals.

It appeared on inquiry that the company had filed an application in the Interior Department of the United States for a right of way for a dam and reservoir at Elephant Butte, and that this application had been approved by the Secretary of the Interior under sections 18 to 21 of the act of March 3, 1891 (26 Stat. 1095, 1101 and 1102). By section 10, however, of the act of September 19, 1890 (26 Stat. 426-454), the "creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters in respect of which the United States has jurisdiction," is prohibited; the "continuance of any such obstruction, except bridges, piers, docks, wharves, and similar structures erected for business purposes," is made an offense, each week's continuance being deemed a separate offense; and every person or corporation guilty of creating or continuing any such unlawful obstruction is punishable by a fine not exceeding \$5,000, or by imprisonment (in the case of a natural person) not exceeding one year, or by both, in the discretion of the court. The creating or continuing of the obstruction may besides be prevented, and the obstruction itself may be caused to be removed, by an injunction granted in proceedings instituted under the direction of the Attorney-General of the United States. Moreover, by section 3 of the act of July 13, 1892 (27 Stat. 88-110), (amending section 7 of the act of September 19, 1890), it is declared to be unlawful "to build any . . . dam . . . or structure of any kind . . . in any navigable waters of the United States . . . in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters," without permission of the Secretary of War.

No permission having been obtained for the erection of the dam across the Rio Grande at Elephant Butte, the question was suggested whether the river in the parts which would be affected was not navigable water of the United States within the meaning of the statutes above quoted, so as to make the sanction of the Secretary of War a requisite to the lawful erection of the dam. There was information tending to show that the Rio Grande was navigable for commercial purposes between the United States and Mexico, and possibly between the States of Colorado and the Territory of New Mexico; that, while it possibly would not float water craft of great size, it had been used in the timber commerce of the country; and that it was in its natural state capable of regular periodical, if not perennial, use as a waterway for commercial traffic between two States of the Union or between the United States and a foreign country. This, if true, would make it a navigable stream of the United States within the meaning of the laws for the protection of such waters and would render proper the adoption of the most effective measures to keep it so. This question was not covered by the Attorney-General's opinion of December 12, 1895, *supra*, which merely held that the stipulations

of the treaties concerning the navigation of the river were inapplicable above the point where it ceased to be the common boundary, and did not consider whether it was navigable water above that point in the sense of the Federal statutes.

Mr. Olney, Sec. of State, to Sec. of War, Jan. 13, 1897, 215 MS. Dom. Let. 200, enclosing a note from the Mexican minister of Aug. 4, 1896, and a letter from the Secretary of the Interior of Dec. 19, 1896.

See, also, Mr. Olney, Sec. of State, to Sec. of Interior, Jan. 11, 1897, 215 MS. Dom. Let. 160.

May 24, 1897, the Attorney-General of the United States filed a bill against the Rio Grande Dam and Irrigation Company to restrain it from constructing the dam above referred to, and the bill was afterwards amended so as to include the Rio Grande Irrigation and Land Company (Limited), a British corporation. It was alleged that the latter company, which was a lessee of the former, intended to construct works to control the entire flow of the Rio Grande at the point in question; that the river received no addition to its volume between that point and the mouth of the Conchos River, 300 miles below; and that, owing to the nature of the soil and the rapidity of evaporation, little of the impounded waters would after their distribution be returned to the river. The bill also averred that the Rio Grande had been navigated by steamboats 350 miles from its mouth up to Roma, Tex.; that it was susceptible of navigation above Roma to a point 350 miles below El Paso, Tex.; and that it had been used between El Paso and La Joya, 100 miles above Elephant Butte, for the floating and transportation of rafts, logs, and poles. The bill finally alleged that the impounding of the waters above Elephant Butte would seriously obstruct the navigable capacity of the river throughout its entire course from that point to its mouth. The answer of the defendants, after setting forth the approval of their application by the Secretary of the Interior, declared that the entire flow of the Rio Grande during the irrigation season at the point where they intended to construct reservoirs had long since been diverted and used by other parties, and that their only object was to store and use such waters as had not been already legally diverted, their purpose being to use chiefly the excess storm and flood waters, which went to waste. The answer also denied that the river was susceptible of navigation or had been navigated above Roma, or had been beneficially used or was susceptible of being used for navigation in New Mexico, or that the proposed works would deplete the flow so as seriously to obstruct the navigability of the river at any point below the proposed dam. The court dismissed the bill on the ground that the Rio Grande was not navigable within the limits of New Mexico, and that the United States, therefore, had no jurisdiction in the case.



An appeal having been taken to the Supreme Court of the United States, that tribunal, upon the proofs, concurred in the conclusion that the Rio Grande was not navigable within the limits of New Mexico. Nor was it necessary, said the court, to consider the treaty stipulations between the United States and Mexico. The questions arising under treaties or international law might under other circumstances be interesting and important, but as it appeared that the United States was under an equal obligation to preserve the navigability of its navigable waters for its own people, the court would confine itself to the consideration of the case in that aspect. By the act of September 19, 1890, it was, said the court, obvious that Congress meant that there should thereafter be no interference with the navigability of a stream without the national assent. It was urged, however, that the operation of the act was limited to obstructions in the navigable portion of a navigable stream, and that, as the Rio Grande was not navigable in New Mexico, the statute did not there apply to it; but the court declared that the terms of the act embraced not merely obstructions to navigation, but any obstruction, wherever or however created, within the jurisdiction of the United States, which tended "to destroy the navigable capacity of one of the navigable waters of the United States." The decree of the court below was therefore reversed, and the case was remanded with instructions "to order an inquiry into the question whether the intended acts of the defendants in the construction of a dam and in appropriating the waters of the Rio Grande will substantially diminish the navigability of that stream within the limits of present navigability, and if so, to enter a decree restraining those acts to the extent that they will so diminish."

United States v. Rio Grande Dam & Irrigation Co. (1899), 174 U. S. 690.

The commissioners of the New York State reservation at Niagara, **Niagara River and Great Lakes.** in their report for the fiscal year ending September 30, 1898 (pp. 12-13), say:

"The volume of the river and cataract at Niagara is of course dependent upon the water supply of the Great Lakes. The Niagara River is but the overflow of Lake Erie, into which flow the waters of the other lakes. The lowering of the level of these lakes would diminish the flow into Lake Erie and reduce the volume of the Niagara River. Any very large withdrawal or diversion of water from one or more of the Great Lakes would scarcely fail to be noticeable in a reduced flow at the cataract.

"The commissioners deem it advisable that the National Government be requested to appoint a commission to confer with a Canadian commission as to the means to be devised to prevent any excessive

diversion of the waters of the Great Lakes, and to consider the whole subject of the uses and control of these waters, and to report its conclusions to Congress, with such recommendations as it may desire to submit."

N. Y. Assembly Documents, 122nd session, 1899, vol. 2, pt. 2. See report of Mr. Clark, of Wyoming, Committee on For. Rel., Feb. 23, 1900, on a joint resolution (S. R. 71) authorizing the President to invite Great Britain to join in creating an international commission to examine and report on the diversion of the waters that form the boundaries between the two countries. (S. Rep. 461, 56 Cong., 1 sess.)

Referring to the damages sustained by certain American citizens in consequence of the erection of a dam by the Canadian authorities at the head of the Beauharnois Canal, in Canada, a report of the executive council of Canada was communicated to the complainants, with an expression of the hope that it would prove satisfactory to them. (Mr. Appleton, Assist. Sec. of State, to Messrs. H. B. & T. S. Mears, March 14, 1860, 52 MS. Dom. Let. 41.)

#### 4. STRAITS.

##### (1) DIVISIONAL LINES.

#### § 133.

The question of the limits of territorial jurisdiction in and over straits or narrow passages leading from one body of water to another is governed by substantially the same principles as that of the limits of territorial jurisdiction in and over rivers.

By the treaty of June 15, 1846, it was agreed (Art. I.) that the boundary between the United States and the British possessions westward of the Rocky Mountains should follow the forty-ninth parallel of north latitude to the middle of the channel separating the continent from Vancouvers Island, and thence proceed southerly "through the middle of said channel, and of Fuca's Straits, to the Pacific Ocean: *Provided, however,* That the navigation of the whole of said channel and straits, south of the forty-ninth parallel of north latitude, remains free and open to both parties." By this stipulation, as well as by their acts subsequent to the award of the German Emperor of October 21, 1872, in the case of the San Juan water boundary, the contracting parties showed their intention to treat the entire waters of the Straits of Fuca as territorial. "The straits of Juan de Fuca are not a great natural thoroughfare or channel of navigation in an international sense; and in view of their situation it is not apprehended that any other nation can make reasonable objection to the jurisdiction of the Government of the United States and of Great Britain over their entire area. The breadth of the narrowest point is believed to be about ten miles, but is not equal to the width of the Delaware Bay and other bodies

of water over which, on account of their situation, the United States have felt authorized to assume jurisdiction."

Mr. Wharton, Acting Sec. of State, to Sec. of Treasury, May 22, 1891, 182 MS. Dom. Let. 79, citing Hall, Int. Law (3d ed.), 140. See Hall, 4th ed. 163.

(2) NAVIGATION.

§ 134.

In a series of resolutions adopted by the Institut de Droit International, at its session in Paris in 1894, on the subject of territorial waters the following general principles with regard to straits were laid down:

1. That straits whose shores belong to different states form part of the territorial waters of the bordering states, which exercise sovereignty to the middle line.

2. That straits whose shores belong to one state form, so far as concerns approach to the coast, part of the territorial waters of such state, although they may be indispensable as a means of maritime communication between two or more other states.

3. That straits which serve as a passage from one free sea to another can never be closed.

From the operation of these rules, straits actually subject to conventions or special usages were expressly reserved.

Institut de Droit International, *Annuaire*, XIII. (1894-95) 330-331.

From a date not definitely ascertained, the Danish Government levied tolls on vessels and cargoes passing through **Danish Sound** dues. the sound and the two belts which form a passage from the North Sea into the Baltic. This exaction was justified by the Danish Government on the ground of immemorial usage, sanctioned by a long succession of treaties. It was also maintained that the Danish exercise of sovereignty had been beneficial to commerce, in the policing and lighting of the waters. The exclusive right of Denmark was recognized as early as 1368 by the Hanseatic Republics. The Emperor Charles V., by a treaty concluded at Spire, in 1544, agreed that the merchants of the Low Countries frequenting the ports of Denmark should pay the same duties as formerly. By a treaty with Henry VII. of England in 1490 English vessels were forbidden to pass the Great Belt as well as the sound, unless in case of unavoidable necessity, in which case they were to pay the same duties at Wyborg as if they had passed the sound at Elsinore. By a treaty between Denmark and the United Provinces of the Netherlands, concluded at Christianople in 1645, the amount of duties to be levied on the passage of the sound and belts was definitely ascertained, and it was stipulated that goods not specified in the tariff should pay according to

mercantile usage and the ancient practice. By a further treaty between the two powers, concluded at Copenhagen in 1701, it was stipulated that articles not specified in the tariff of 1645 should be assessed 1 per cent on their value at the place from which they came. The treaties of 1645 and 1701 were referred to in all subsequent treaties, as fixing the standard of rates to be paid by "privileged" nations. Different rates were paid by nations not privileged. A revision of duties was effected by a convention between Denmark and Great Britain in 1841.<sup>a</sup>

By Article V. of the treaty of commerce and navigation between the United States and Denmark, concluded April 26, 1826, it was agreed that neither the vessels of the United States nor their cargoes should, when they passed the sound or belts, pay higher or other duties than those paid by the most favored nation. The subject of the dues was brought up for discussion in consequence of the British-Danish treaty of 1841, which, as the United States maintained, virtually imposed on raw sugar and rice in paddy a duty of 2 per cent to the detriment of the trade of the United States.<sup>b</sup> This question was duly adjusted.<sup>c</sup> The subject of the dues was, however, revived by Mr. Calhoun in 1844, who instructed the diplomatic representative of the United States at Copenhagen to obtain further information concerning it.<sup>d</sup>

"Under the public law of nations, it can not be pretended that Denmark has any right to levy duties on vessels passing through the sound from the North Sea to the Baltic. Under that law, the navigation of the two seas connected by this strait is free to all nations; and therefore the navigation of the channel by which they are connected ought also to be free. In the language employed by Mr. Wheaton, 'even if such strait be bounded on both sides by the territory of the same sovereign, and is at the same time so narrow as to be commanded by cannon-shot from both shores, the exclusive territorial jurisdiction of that sovereign over such strait is controlled by the right of other nations to communicate with the seas thus connected.' But the sound is not bounded on both its shores by Danish territory, nor has it been since the treaty of Roeskild, in 1658, by which all the Danish provinces beyond the sound were ceded to Sweden. So that even this pretext for levying the sound dues has ceased to exist for nearly two centuries.

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<sup>a</sup> Wheaton's International Law (Dana's ed.), 264.

<sup>b</sup> Mr. Webster, Sec. of State, to Mr. Jackson, min. to Denmark, No. 6, Sept. 1, 1841, H. Ex. Doc. 108, 33 Cong. 1 sess. 2.

<sup>c</sup> Mr. Webster, Sec. of State, to Mr. Bille, Danish min., June 27, 1842, H. Ex. Doc. 108, 33 Cong. 1 sess. 13.

<sup>d</sup> Mr. Calhoun, Sec. of State, to Mr. Irwin, min. to Denmark, No. 12, Sept. 13, 1844, H. Ex. Doc. 108, 33 Cong. 1 sess. 29.

"It is true that for several centuries Denmark has continued to levy these dues; and she now claims this as a right, 'upon immemorial prescription, sanctioned by a long succession of treaties with foreign powers.' But the foundations of this claim were laid in a remote and barbarous age, even before the discovery of America; and the reasons which are now alleged in its support have no application whatever to the United States. They apply exclusively to the nations of Europe.

"It may be said that the 5th article of our treaty with Denmark of the 26th April, 1826, gives an indirect sanction to this practice, by providing that 'neither the vessels of the United States nor their cargoes shall, when they pass the sound or the belts, pay higher or other duties than those which are or may be paid by the most favored nation.' But this article does not recognize the right of Denmark to levy these duties. It is a mere submission to the practice for a period of ten years; and the Government of the United States may now at any moment give the notice required by the treaty, and thus terminate it at the end of one year.

"These duties are both vexatious and onerous to our navigation. The loss of time and delay of our vessels at Cronberg castle, whilst the duties are assessed and paid, constitute a serious annoyance and injury to our commerce. Besides, the amount of duties is so great as to be a heavy burden upon our trade to the Baltic. Your predecessor, Mr. Irwin, in a despatch under date of the 3d June, 1847, No. 121, to which I refer you, has furnished the department with tabular statements of the amount of these duties exacted from American vessels for a period of sixteen years, from 1828 to 1843, both inclusive; from which it appears that the average for each year would amount to \$107,467.71. According to these statements, the average tonnage of our vessels going through the sound during these years was 21,415, and that returning was 21,108 tons. This sum would, therefore, be about equal to an average tonnage duty upon each vessel for passing and repassing the sound of \$5 per ton, including both voyages. Besides there are other charges for light-money, fees, etc. This large tax is paid by vessels of the United States for liberty to pass through a strait between two seas, which, by the law of nature and of nations, is free and open to all mankind! The United States have thus long submitted to the exaction from deference and respect for Denmark; but it can not be expected, great as is our regard for that ancient and respectable power, that we shall submit to it much longer. . . .

"It is probable that two years might elapse before the existing convention could be terminated, as an act must first pass Congress to enable the President to give the required notice, after which a year must expire before it could be rendered effectual. During the whole period our vessels would be subject to the sound dues under the pres-

ent convention. For this reason, if you should find it indispensable to success, but not otherwise, you may stipulate to pay the Government of Denmark a sum not exceeding \$250,000; but, in that event, the abrogation of the sound and belt dues must be made perpetual, and must be excluded, in express terms, from any notice which may hereafter be given by either party to terminate the treaty."

Mr. Buchanan, Sec. of State, to Mr. Flenniken, min. to Denmark, No. 7. Oct. 14, 1848, H. Ex. Doc. 108, 33 Cong. 1 sess. 38, 39, 42 MS. Inst. Denmark, XIV. 59.

In 1853 the Government of Denmark was advised of the purpose of the United States to press the subject of the sound dues to a conclusion. The dues, it was declared, affected the United States more sensibly than any European nation, and in respect of their chief staple, raw cotton, operated as a discrimination against American commerce. Vague intimations, it was observed, had occasionally been given at Copenhagen that the sound tolls were guaranteed to Denmark by the Congress of Vienna, as an indemnity for the surrender of Norway to Sweden. "Admitting the truth of this, and that every European government was irrevocably bound by such proceeding, the United States," it was declared, "were not a party to it in any way, and no obligation is imposed upon them to respect the arrangement. Nothing has been more remote from the purpose of our Government, from the day on which it was ushered into existence, than that of surrendering to any power its right of using the ocean as the highway of commerce. This right it claims, and will use all proper means to secure to itself the full enjoyment of in every quarter of the globe."<sup>a</sup>

In his annual message of 1854 President Pierce stated that he deemed it expedient to notify the Government of Denmark of the intention of the United States to terminate the treaty of 1826, in accordance with its terms. By a resolution of the Senate, passed March 3, 1855, the President was authorized to give such notice, and it was accordingly given April 14, 1855.<sup>b</sup>

The United States, though doubtful as to the course which various European powers might pursue, counted upon the support of Prussia. Of this support, however, the United States had received no assurance, its action being inspired by the determination no longer to submit to the collection of the tolls.<sup>c</sup> But the course of the United States

<sup>a</sup> Mr. Marcy, Sec. of State, to Mr. Bedinger, min. to Denmark, July 18, 1853, H. Ex. Doc. 108, 33 Cong. 1 sess. 53, 56.

<sup>b</sup> President Pierce, annual message, Dec. 31, 1855, H. Ex. Doc. 1, 34 Cong. 1 sess. 9; Cong. Globe, 34 Cong. 1 sess., pt. 2 (1855-56), 826; Schuyler, Am. Diplomacy, 314.

<sup>c</sup> Mr. Marcy, Sec. of State, to Mr. Vroom, min. to Prussia, Sept. 20, 1855, MS. Inst. Prussia, XIV. 226.

was generally sustained by the sentiment of the commercial world; and in October, 1855, Denmark invited the interested governments, including the United States, to take part in a conference in Europe for the purpose of doing away with the collection of the dues, in connection with a plan for their capitalization. This invitation the United States declined, for reasons stated by President Pierce in his annual message of 1855. One of these reasons was that Denmark did not offer to submit to the conference the question of her right to levy the tolls. The second was that, if the conference were allowed "to take cognizance of that particular question, still it would not be competent to deal with the great international principle involved, which affects the right in other cases of navigation and commercial freedom, as that of access to the Baltic. Above all," continued President Pierce, "by the express terms of the proposition it is contemplated that the consideration of the sound dues shall be commingled with and made subordinate to a matter wholly extraneous—the balance of power among the governments of Europe." President Pierce added, however, that he had expressed to Denmark a willingness on the part of the United States to share liberally with other powers in compensating her for any advantages which commerce should thereafter derive from expenditures made by her for the improvement and safety of the navigation of the sound or belts.

"By a convention of April 11, 1857, between the United States and Denmark, the navigation of the sound and belts is declared free to American vessels; and Denmark stipulates that these passages shall be lighted and buoyed as heretofore, and to make such improvements in them as circumstances may require, without any charges to American vessels and their cargoes, and to maintain the present establishment of pilots, it being optional for American masters to employ them at reasonable rates fixed by the Danish Government or to navigate their own vessels. In consideration of these stipulations the United States agreed to pay to Denmark 717,829 rix-dollars, or \$393,011 in the currency of the United States. Any other privileges granted by Denmark to any other nation at the sound and belts, or on her coasts and in her harbors, with reference to the transit by land, through Danish territory, of their merchandise, shall be extended to and enjoyed by citizens of the United States, their vessels and property. The convention of April 26, 1826, to become again binding, except as regards the article referring to the sound dues. United States Statutes at Large, vol. xi, p. 719."

Lawrence's Wheaton (1803), 335. See, also, Benton's *Thirty Years' View*, II. 362.

The subject of the sound dues is discussed in Woolsey's *Int. Law*, § 61; *North American Review* for Jan. 1857; 2 *Flore Droit Int.*, 2d ed. (trans. by Antoine, 1885), § 724; 3 *Calvo Droit Int.*, 3d ed. 342.

The correspondence of the United States with Denmark may be found in 45 Br. & For. State Papers, 807.

The correspondence of Great Britain may be found in the same series, vol. 46, p. 650.

A prohibition to engage in the coasting trade is not a violation of the right of free navigation of Fuca's Straits, secured to the United States and Great Britain by the treaty of June 15, 1846.

Mr. Wharton, Acting Sec. of State, to Sec. of Treasury, May 22, 1891, 182 MS. Dom. Let. 79.

The Government of the United States will not tolerate exclusive claims by any nation whatsoever to the Straits of Magellan, and will hold responsible any government that undertakes, no matter on what pretext, to lay any impost or check on United States commerce through those straits.

Mr. Evarts, Sec. of State, to Mr. Osborn, Jan. 18, 1879, MS. Inst. Chile, XVI. 238.

Art. V. of the treaty between the Argentine Republic and Chile of July 23, 1881, provides: "Magellan's Straits are neutralized forever, and free navigation is guaranteed to the flags of all nations. To insure this liberty and neutrality no fortifications or military defenses shall be created that could interfere with this object." (72 Br. & For. State Papers, 1104.)

See For. Rel., 1879, 23; Abribat, *Le Détroit de Magellan au point de vue international*: Paris, 1903.

As to the Strait of Canso, see *infra*, § 163, on the northeastern fisheries. See also S. Ex. Doc. 100, 32 Cong. 1 sess. 73-74, 81, 106, 108, 113, 135; Sabine's Report on the Fisheries, 228, 229, 230, 263, 287-290; For. Rel. 1870, 430; For. Rel. 1873, III., 284.

By treaties with various European powers from 1774 to 1806 Turkey agreed to the free navigation of the Dardanelles by commercial vessels.<sup>a</sup> Article VII. of the treaty between the United States and Turkey of May 7, 1830, declared that "merchant vessels of the United States, in like manner as vessels of the most favored nation," should "have liberty to pass the canal of the imperial residence and go and come in the Black Sea, either laden or in ballast." Nothing was said as to ships of war.

By the treaty between Austria, France, Great Britain, Prussia, Russia, and Turkey, signed at London July 13, 1841, it was declared that the Sultan was firmly resolved to maintain the ancient rule of his Empire, by which the entrance of foreign men-of-war into the Dardanelles and the Bosphorous was prohibited. The other powers engaged to respect this determination of the Sultan. It was further declared, however, that the Sultan reserved to himself, as in the

<sup>a</sup> Schuyler, *Am. Diplomacy*, 317.



past, the right to deliver firmans of passage for light vessels under flags of war which should be employed, as usual, in the service of the missions of foreign powers.

By Article XI. of the treaty of Paris of March 30, 1856, the Black Sea was declared to be neutralized, and its waters and ports were thrown open to the mercantile marine of every nation, but "formally and in perpetuity interdicted to the flag of war," except that Russia and Turkey reserved the right to maintain in the Black Sea a certain number of light vessels for the service of their coasts, while each of the contracting powers was to be permitted to station two light vessels at the mouth of the Danube for the purpose of insuring the execution of the regulations for its navigation. By a separate convention, signed by all the powers March 30, 1856, the rule of the treaty of 1841 with regard to the exclusion of foreign ships of war from the Dardanelles and the Bosphorous was expressly reaffirmed. By the treaty of London of March 13, 1871, it was declared that the principle of closing the Straits of the Dardanelles and the Bosphorous, as established by the separate convention of March 30, 1856, was "maintained, with power to his Imperial Majesty the Sultan to open the said straits in time of peace to the vessels of war of friendly and allied powers," in case he should judge it necessary in order to secure the execution of the general treaty of Paris of March 30, 1856.

"Your despatches to No. 23, inclusive, with the exception of No. 16, have been received. There is no disposition to question the statement of Prince Gortchakoff that the Russian minister at Constantinople, in protesting against the visit of the *Wabash* to that city, was actuated by a regard to the obligations of his Government as a party to the treaty of Paris, and not by unkind feelings toward the United States. As this Government, however, was not a party to that instrument, it is conceived that it could not, upon the occasion adverted to, or upon any similar one, be expected to act in conformity with the views of any other of those parties than the Sublime Porte."

Mr. Cass, Sec. of State, to Mr. Pickens, mln. to Russia, Jan. 14, 1859,  
MS. Inst. Russia, XIV. 159.

In 1868 the President was requested, by a resolution of the House of Representatives, to instruct the minister of the United States at Constantinople to urge upon the Government of the Sultan the abolition of all restrictions and charges upon the passage of vessels of war and commerce through the straits of the Dardanelles and Bosphorus to the Black Sea, and to endeavor to procure "the perfect freedom of navigation through those straits to all classes of vessels." No action appears to have been taken under this resolution beyond instructing the minister to obtain for the Department of State such

information as he might be able to secure concerning the obstructions, restrictions, charges, or burdens of any sort to which, by any treaty, law, decree, or custom, ships of war and trading vessels were subjected or exposed in the navigation of the Dardanelles, Bosphorus, and Black Sea.

Mr. Seward, Sec. of State, to Mr. Morris, min. to Turkey, July 11, 1868, MS. Inst. Turkey, II. 221.

A similar instruction was addressed to Mr. Clay, United States minister at St. Petersburg, who applied to the ministry of foreign affairs, but failed to obtain any information. The Russian minister at Washington was subsequently advised that it was "uncertain" whether the President would take the "initiatory measure" which the resolution proposed. It was at the same time stated that the United States were "in principle and by habit favorable to the largest freedom of navigation and commerce compatible with the rights of individual nations," and might therefore be expected to "favor the removal of the restrictions upon the navigation of the Bosphorus and Dardanelles within the limits of international law." (Mr. Seward, Sec. of State, to Mr. Stoeckl, Russian min., Oct. 5, 1868, MS. Notes to Russian Legation, VI. 273.)

In May, 1871, the American legation at Constantinople was instructed that the United States was "not disposed to prematurely raise any question to disturb the existing control which Turkey claims over the straits leading into the Euxine." The United States, it was said, had observed the acquiescence of other powers whose greater propinquity would suggest more intimate interests in the usage whereby the Porte claimed the right to exclude national vessels of other powers from the passage of those straits; but, while this Government did not deny the existence of the usage and had had no occasion to question the propriety of its observance, the President deemed it "important to avoid recognizing it as a right under the law of nations." The position of Turkey with reference to the Euxine was compared with that of Denmark with reference to the Baltic, except that Turkey was sovereign over the soil on both sides of the straits, while Sweden owned the territory on the east of the sound leading to the Baltic. The Danish sound dues had, however, been abolished by the payment of a gross sum by each country proportionate to the amount of its tonnage passing through the sound. Continuing, the Department of State said:

"We are not aware that Denmark claimed the right to exclude foreign vessels of war from the Baltic merely because in proceeding thither they must necessarily pass within cannon shot of her shores. If this right has been claimed by Turkey in respect to the Black Sea, it must have originated at a time when she was positively and comparatively in a much more advantageous position to enforce it than she now is. The Black Sea, like the Baltic, is a vast expanse of waters,

which wash the shores not alone of Turkish territory, but those of another great power who may, in times of peace at least, expect visits from men-of-war of friendly states. It seems unfair that any such claim as that of Turkey should be set up as a bar to such an intercourse, or that the privilege should in any way be subject to her sufferance. There is no practical question making it necessary at present to discuss the subject, but should occasion arise when you are called upon to refer to it, you will bear in mind the distinction taken above, and be cautious to go no further than to recognize the exclusion of the vessels as a usage."

Mr. Fish, Sec. of State, to Mr. McVeagh, min. to Turkey, No. 29, May 5, 1871, For. Rel. 1871, 902.

See, also, dispatches of Mr. MacVeagh, min. to Turkey, to Mr. Fish, Sec. of State, of Jan. 24, 1871, and March 27, 1871, For. Rel. 1871, 892, 897. Mr. MacVeagh in these dispatches maintains the position that the closing of the straits to ships of war has never been based upon the agreement of the powers recognizing it, but always upon the "undoubted rights" of the Ottoman Empire, and that "we began our intercourse with Turkey by a treaty which secured for our vessels of commerce the right of passing these straits, and thus excluded the idea that we possessed the same right for our ships of war." (For. Rel. 1871, 896, 899.)

"Your despatch No. 68, of the 30th of November last, has been received. This Department understands that Captain Rhind of the *Congress* had no authority to apply for a firman for that vessel to pass the Dardanelles. It is therefore more or less a matter of regret that he should have made the application for that purpose through you, and that you should have deemed it your duty so promptly to accede to his request. He is known as a brave, enterprising and skilful officer. As such it was natural that he should have been ambitious to carry his vessel to Constantinople as a specimen of the naval force of his country. It is presumed, however, that he could not have been well aware of the obstacles to that step, of the precedents upon the subject, and especially of the circular of Fuad Pasha to the representatives of the powers at Constantinople, bearing date the 19th of August, and referred to in Mr. Morris's despatch of the 29th of October, 1868.

"The abstract right of the Turkish Government to obstruct the navigation of the Dardanelles even to vessels of war in time of peace, is a serious question. The right, however, has for a long time been claimed and has been sanctioned by treaties between Turkey and certain European states. A proper occasion may arise for us to dispute the applicability of the claim to United States men-of-war. Meanwhile it is deemed expedient to acquiesce in the exclusion."

Mr. Fish, Sec. of State, to Mr. Boker, min. to Turkey, Jan. 3, 1873, MS. Inst. Turkey, II. 452.

"I have to acknowledge the reception of your No. 72, dated the 17th day of December last. The request of the commander of the *Shenandoah* for leave to pass the Dardanelles was, as you have been informed, unauthorized by the Navy Department and countermanded. The article from the *Lerant Herald*, which accompanies your despatch, does not state whether the shot was fired at the French steamer, or in front, as a signal to stop. The United States are not a party to the convention which professes to exclude vessels of war from the Dardanelles; and while it is disposed to respect the traditional sensibility of the Porte as to that passage, the shot which it is supposed may have been intended for a national vessel of this Government might if it had been directed according to the supposed intention have precipitated a discussion if not a serious complication."

Mr. Fish, Sec. of State, to Mr. Boker, min. to Turkey, Jan. 25, 1873, MS. Inst. Turkey, II. 456.

Acting upon a request made by Admiral Selfridge, U. S. Navy, Mr. Terrell, American minister at Constantinople, in November, 1895, asked the Porte for a firman to enable the Admiral to pass the Dardanelles with the U. S. S. *Marblehead* and visit the Ottoman capital. The application was refused by the Sultan, who expressed apprehension that, if the desired permission should be granted, other powers would seek to take advantage of it, and specially requested that the Admiral should not come to the Dardanelles.

Mr. Terrell, min. to Turkey, to Mr. Olney, Sec. of State, Nov. 21 and Dec. 6, 1895, For. Rel. 1895, II. 1344, 1383.

See, also, Mr. Sherman, Sec. of State, to Mr. Terrell, min. to Turkey, tel., April 8, 1897, MS. Inst. Turkey, VII. 72; same to same, April 10, 1897, id. 73; Mr. Terrell, min. to Turkey, to Mr. Sherman, Sec. of State, tel., April 8, 1897; and dispatch No. 1278, May 4, 1897, 65 MS. Dispatches, Turkey.

See, also, Mr. Olney, Sec. of State, to Mr. Baldwin, Nov. 26, 1895, 206 MS. Dom. Let. 203.

"His Excellency Teflik Pasha has just informed me that the Sublime Porte regrets that it can not comply with Mr. Terrell's request for permission for the *Bancroft* to pass through the strait, that vessel having been authorized to remain at the disposal of the United States legation at Constantinople.

"Your excellency knows perfectly well the earnest and sincere desire of the Imperial Government to do all in its power to strengthen if possible the ties of friendship which unite the two countries, but in this case a certain fact is involved, to wit, that only the signatory powers of the treaty of Paris enjoy the right to have vessels of war permanently at Constantinople at the orders of their respective embassies. Now, the United States Government does not appear in the number of the signatories of that treaty. I am, consequently, sure that your excellency will be pleased to take the foregoing into consideration." (Mavroyeni Bey, Turkish min., to Mr. Olney, Sec. of State, Jan. 16, 1896, For. Rel. 1895, II. 1461.)

## 5. INTERIOR SEAS AND LAKES.

## § 135.

Interior seas and lakes form part of the territory in the same sense as does the land. An interior sea is one that has no direct communication with the ocean. If it is entirely surrounded by the lands of a single state, such state has over it the same exclusive and absolute right as it has over any part of its territory, and may forbid or permit access to or use of it.

The same principle applies to a lake surrounded on every side by the lands of the state. The fact that the water of the sea is salt and that of the lake fresh, is a matter of indifference from the legal point of view. Interior seas are in reality, in spite of their names, merely salt lakes.

Interior seas and lakes, enclosed by the lands of two or more states, belong to them in proportionate parts, unless it is otherwise provided.

The water itself, considered independently of the soil, is common.

There is no question, in respect of interior seas, either of freedom of the sea or of marginal sea, since these ideas exist only in respect of the ocean.

The best example of an interior sea is the Dead Sea. As examples of interior lakes we may cite Lake Michigan, entirely American, though it connects with Lake Huron; Lakes Winnipeg and Manitoba, which are English; Lakes Ladoga and Onéga, which are Russian; Lakes Wenern and Wettern, Swedish; Lake Balaton, Hungarian; Lakes Zurich, Quatre Cantons, Neuchâtel, Morat, and Bienne are entirely Swiss. Lakes Thoune and Brienz are wholly Bernese.

The Caspian Sea is surrounded by Russia and Persia, but, by virtue of the treaties of Gulistan (1813) and Tourkmantschaï (1828), it is subject practically to Russian control; Russian authorities administer it, and only Russia has the right to keep ships of war in it. The Sea of Aral is entirely Russian. Lake Lemman belongs to Switzerland (Vaud, Geneva, and Valais) and to France in divided parts. Lake Constance belongs to Germany (Baden, Bavaria, Wurtemberg), to Switzerland (Thurgovia, St. Gall), and to Austria. Opinions are divided as to Lake Obersee, but it is necessary to pronounce in favor of division; the principle of the meridian line is established by the treaties of 1554 and 1854.

Rivier, *Principes du Droit des Gens*, I. 143-145, 230.

See, also, Wharton, *Com. on Law*, § 192; Woolsey, § 61; Holtzendorff, *Handbuch*, 4th ed. 1882, 1222, referring to Twiss, *Territorial Waters*, *Nautical Mag.*, 1878; Störk, *Jurisdiktion in Küstengewässern*; Renault, *De l'exercice de juridiction criminelle dans la mer territoriale*, *Journal, de droit int. privé*, VI. 217.

6. THE GREAT LAKES.<sup>a</sup>

## (1) JURISDICTION.

## § 136.

R. was indicted in the district court of the United States for the eastern district of Michigan for an assault with a dangerous weapon, committed on the American steamer *Alaska*, while she was in the Detroit River, out of the jurisdiction of any particular State and within the limits of the Dominion of Canada. The indictment was found under section 5346 of the Revised Statutes of the United States, by which the offense in question was made punishable when committed on an American vessel "upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty jurisdiction of the United States and out of the jurisdiction of any particular State." The defendant filed a plea to the jurisdiction; the United States demurred, and on this demurrer the judges of the circuit court certified a division of opinion on the question whether the courts of the United States had jurisdiction under the section in question. *Held*, that the inclosed waters of the Great Lakes were "high seas" within the meaning of the statute, and that the Detroit River, as a connecting stream, fell within the scope of the legislative intention. The court in the course of its opinion said: "The Great Lakes possess every essential characteristic of seas. They are of large extent in length and breadth; they are navigable the whole distance in either direction by the largest vessels known to commerce; objects are not distinguishable from the opposite shores; they separate, in many instances, States, and in some instances constitute the boundary between independent nations; and their waters, after passing long distances, debouch into the ocean. The fact that their waters are fresh and not subject to the tides does not affect their essential character as seas. Many seas are tideless, and the waters of some are saline only in a very slight degree."

United States *v.* Rodgers (1893), 150 U. S. 249, 256, 14 S. Ct. 109, opinion by Mr. Justice Field, citing *Genesee Chief*, 12 Howard, 443, and *Illinois Central Railroad v. Illinois*, 146 U. S. 387, 435, and expressing disapproval of *People v. Tyler*, 7 Michigan, 161; Justices Gray and Brown dissented.

See, also, United States *v.* Rogers, 46 Fed. Rep. 1; *Inman v. Lindrup*, 62 Fed. Rep. 851; United States *v.* Peterson, 64 Fed. Rep. 145.

As to jurisdiction in Detroit River and St. Clair Flats, see Letter of Sec. of War to Pres. pro tem. of Senate, Dec. 7, 1888, S. Ex. Doc. 52, 50 Cong. 2 sess.

<sup>a</sup> For the international boundary in the Great Lakes, see Moore, *International Arbitrations*, vol. 1, chapters v. and vi.; and vol. 6 (maps).

“ It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States in which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. *Pollard's Lessee v. Hagan*, 3 How. 212; *Weber v. Harbor Commissioners*, 18 Wall. 57.

“ The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes over which is conducted an extended commerce with different States and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes. At one time the existence of tide waters was deemed essential in determining the admiralty jurisdiction of courts in England. That doctrine is now repudiated in this country as wholly inapplicable to our condition. In England the ebb and flow of the tide constitute the legal test of the navigability of waters. There no waters are navigable in fact, at least to any great extent, which are not subject to the tide. . . .

“ But in this country the case is different. Some of our rivers are navigable for great distances above the flow of the tide; indeed, for hundreds of miles, by the largest vessels used in commerce. . . .

“ The Great Lakes are not in any appreciable respect affected by the tide, and yet on their waters, as said above, a large commerce is carried on, exceeding in many instances the entire commerce of States on the borders of the sea. When the reason of the limitation of admiralty jurisdiction in England was found inapplicable to the condition of navigable waters in this country, the limitation and all its incidents were discarded. So also, by the common law, the doctrine of the dominion over and ownership by the Crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters, as already said, being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license

of the Crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations."

*Illinois Central Railroad v. Illinois* (1892), 146 U. S. 387, 435-437. See also, *Cushing, At-Gen.* (1853), 6 Op. 172; *Mobile Transportation Co. v. Mobile* (1903), 187 U. S. 479, 482, 491.

Title to and dominion over lands beneath the navigable waters of the Great Lakes are in the States, respectively, within whose boundaries such lands are situated, each State holding the fee thereof in trust for the people for purposes of navigation and fishing.

*People v. Kirk* (1896), 162 Ill. 138, 45 N. E. 830; *Bodi v. Winous Point Shooting Club*, 57 Ohio St. 226, 48 N. E. 944; *Dwelle v. Wilson*, 14 Ohio Cir. Ct. R. 551; *People v. Silberwood* (Mich.), 67 N. W. 1087. See, also, *Allen v. Allen*, 19 R. I. 114, 61 Am. St. Rep. 738.

An owner of land on Lake Michigan is entitled to accretions formed by recession of the water. (*Chicago Dock, &c., Co. v. Kinzie*, 93 Ill. 415.)

## (2) FISHING RIGHTS.

### § 137.

"This Department has received two letters from you, dated, respectively, April 19th and 30th, in relation to the fishing rights of citizens of the United States and of Canada in the open waters of the Great Lakes. . . .

"The question you present, viz, whether citizens of the United States have the right to fish in the waters of the Great Lakes on the Canadian side of the boundary line as fixed by treaty, but at a distance of more than three miles from the Canadian shore, has been carefully considered by the Department.

"The conclusion is reached that the Great Lakes, whose waters separate the United States from the British Dominion of Canada are wholly territorial, and that the territorial jurisdiction of the respective sovereignties extends and is exercisable to the boundary which, by treaty, has been established between them as running through the middle of said lakes. This Government can neither



claim nor admit that in the centre of these lakes, on either side of the treaty boundary and up to a distance of one marine league from shore, there can be an area of 'high seas' in the determination of a question such as is presented.

"It is true that by a recent decision of the Supreme Court (two of the justices vigorously dissenting) it has been held that the great Lakes are 'high seas,' within the meaning of a statute of the United States giving the Federal courts jurisdiction over certain crimes committed upon American vessels 'on the high seas and out of the jurisdiction of any particular State.' The 'particular State' so referred to has long been settled to mean one of the States of the Union and not a foreign country.

"In the case where this opinion was delivered the crime over which jurisdiction was assumed under the crimes act was committed on a vessel in waters conceded by all the court to be within the territorial limits of Canada, and it has several times been held by the United States Supreme Court that the waters of the ocean within three miles of the coast of a foreign country, and hence undoubtedly within its jurisdiction, are nevertheless high seas within the meaning of our Federal crimes act.

"Conceding, then, that the Great Lakes (including Lake Michigan, which lies wholly within the boundaries of the United States) are 'high seas' within the meaning of our Federal crimes act, it by no means follows that those waters are 'high seas' as regards territorial rights of the sovereignties which own their shores.

"At the time when the United States achieved independence the Great Lakes belonged exclusively to Great Britain. No other nation had any rights in or over them. By the treaty of peace of 1783 the lakes were divided between the contracting parties and the boundary fixed as running through the middle of the lakes and of the waterways connecting them. The United States and Great Britain thus shared thenceforth, to the exclusion of any claim whatsoever of a third nation, the territorial sovereignty over the lake waters which had theretofore been wholly British, and it was competent for the two countries to treat with each other in respect to their relative rights in those lakes without encroaching on any possible right of another country.

"This was in fact done in the treaty of Washington of 1871, whereby Lake Michigan, which is wholly within the exclusive territorial domain of the United States, was open to navigation by British subjects, in consideration (as appears from the statements of the negotiating commissioners, Foreign Relations, 1871, p. 513) for increased privileges in respect to the St. Lawrence River and the Canadian canals offered by Great Britain.

"By the treaty of 1783, the two nations fixed a certain boundary line through the lakes and the connecting waterways, each claiming for itself and conceding to the other territorial jurisdiction in the waters on the respective sides of the boundary line up to the line itself.

"By the treaty of 1794, the right of common navigation of the boundary waters was reciprocally stipulated in favor of the citizens and subjects of the two countries. By the treaty of 1871, these rights of navigation and passage were extended and defined as regards the several waterways of communication and access lying wholly within the territory of the respective parties.

"The rights so shared by convention relate to navigation and transit alone. As to other uses or purposes the two countries have uniformly reserved and asserted territorial jurisdiction over their respective treaty waters.

"A recent recognition of this jurisdiction is contained in the reciprocal legislation of the United States and Canada whereby each country gives wrecking privileges in the lakes and waterways on its side of the line to vessels of the other country.

"The right of fishing cannot by any parity or stretch of reasoning be deemed a part of the stipulated rights of navigation and transit: and it has not, by convention or reciprocal legislation in the nature of a treaty, been created in favor of the citizens of either country fishing in the waters of the other.

"It is assumed that the Canadian authorities act in accordance with the law of the Dominion in prohibiting unlicensed fishing on the Canadian side of the boundary line running through the Great Lakes as fixed by existing treaty. That no corresponding prohibition has been established on this side under Federal or State laws in no wise affects the competence of Canada to legislate for the regulation and protection of its fisheries on its side of the boundary. The right of the United States to so legislate is equally complete.

"The right of fishing in the waters of the lakes or in the connecting waterways thereof depends merely upon the local law, and this Government cannot complain against the action of Canada in excluding our citizens from unlicensed fishing on the Canadian side of the conventional boundary, even though at a greater distance than three miles from shore. . . .

"Any cases of Canadian interference with the operations of American citizens taking fish within the territorial waters of the United States will be promptly considered and pressed upon due establishment of the fact. In this regard the question is not novel, similar cases having occurred in the past, especially in the narrow waterways where the location of the boundary admitted of little doubt, and having been disposed of upon the ascertained facts. That the Do-

minion authorities have not heretofore systematically asserted their fishery rights in the more open waters of the lakes is supposed to be because until this year no adequate patrol force had been established."

Mr. Uhl, Acting Sec. of State, to Messrs. Laughlin, Ewell & Houtt, May 23, 1894, 197 MS. Dom. Let. 118.

See, to the same effect, Mr. Gresham, Sec. of State, to Mr. Hooker, Jan. 2, 1895, saying: "The Department concurs in the view expressed by the Canadian Judge (McDougall, in the case of the American vessel *Grace*) that the lake waters on either side of the international boundary line are under the exclusive municipal jurisdiction of the respective countries." (200 MS. Dom. Let. 121.)

See, also, Mr. Uhl, Act. Sec. of State, to Mr. Springer, Feb. 8, 1895, 200 MS. Dom. Let. 513. Also, Mr. Fish, Sec. of State, to Mr. Campau, June 4, 1899, 81 MS. Dom. Let. 215; Mr. Hay, Sec. of State, to Mr. Alexander, May 11, 1900, 245 MS. Dom. Let. 57.

An American fisherman is not entitled to damages for the seizure of his nets by the Canadian authorities, where part of the nets was in British waters. (Mr. Bayard, Sec. of State, to Mr. Chipman, M. C., Feb. 2, 1889, 17 MS. Report Book, 327.)

"The international boundary in the river [St. Lawrence] channel is not 'imaginary,' as you say, but has been surveyed and charted; and on the British side of that line the Canadians have a right to enforce such fish and game laws as may be enacted in the Dominion. The circumstance that no corresponding fish and game laws are enforced on the American side of the boundary does not affect the Canadian rights in the premises." (Mr. Uhl, Acting Sec. of State, to Mr. Payne, March 27, 1895, 201 MS. Dom. Let. 304; affirmed by Mr. Gresham, Sec. of State, to Mr. Payne, April 18, 1895, 201 MS. Dom. Let. 553.)

### (3) NAVIGATION.

#### § 138.

In respect of the right of navigation, the lakes that separate the two countries, i. e., Lakes Ontario, Erie, Huron, and Superior, and their water communications, are treated as international waters, being dedicated in perpetuity to the common navigation of all the inhabitants.

It may be superfluous to remark that this common right of navigation does not embrace the respective coasting trade of the contracting parties, a limited participation in which was reciprocally conceded by Article XXX. of the treaty of Washington of May 8, 1871. This article was terminated by notice, in conformity with the stipulations of the treaty, July 1, 1885.

The act of Congress of March 3, 1851 (9 Stat. 635), limiting the liability of ship owners in certain cases, in terms declared that its provisions should not apply to vessels used in "rivers or inland navigation." It was held that this exception did not embrace a propeller enrolled and licensed for the coasting trade between places in different

States on the Great Lakes and actually engaged in a voyage from Buffalo to Detroit, such navigation not being properly regarded as "inland navigation." The Great Lakes, said the court, "form a boundary" between a foreign country and the United States "for a distance of some 1,200 miles, and are of an average width of at least 100 miles. . . . The aggregate length of these lakes is over 1,500 miles, and the area covered by their waters is said to be some 90,000 square miles. . . . The waters of these lakes, in the aggregate, exceed those of the Baltic, the Caspian, or the Black Sea, and approach in magnitude those of the Mediterranean. They exceed those of the Red Sea, the North Sea or German Ocean, the Sea of Marmora, and of Azoff, and, like the lakes, all of these seas, with the exception of the North Sea, are tideless."

Moore v. American Transportation Co., 24 How. 1, 37.

By Article XXVIII. of the treaty of Washington of May 8, 1871. it was stipulated that the navigation of Lake Michigan, which lies wholly within the jurisdiction of the United States, should, for the term of years mentioned in Article XXXIII. of the treaty, "be free and open for the purposes of commerce to the subjects of Her Britannic Majesty, subject to any laws and regulations of the United States or of the States bordering thereon not inconsistent with such privilege of free navigation."<sup>a</sup>

By Article XXXIII. it was provided that Articles XVIII.-XXV., which related to the fisheries, and Article XXX., which granted to the citizens of each country a certain participation in the coasting trade of the other, should remain in force ten years after they should come into operation, and further till the expiration of two years after either party should have given notice to the other of its wish to terminate them.

July 2, 1883, the United States, pursuant to a joint resolution of Congress gave notice of the termination of Articles XVIII.-XXV., inclusive, and Article XXX. of the treaty of May 8, 1871; and it was agreed that Article XXXII. fell with them, it being wholly dependent upon them.<sup>b</sup> No mention was made of Article XXVIII.<sup>c</sup>

#### (4) WATER COMMUNICATIONS.

### § 139.

In the discussion of the boundary from Lake Superior to the Lake of the Woods, by the commissioners under Article VII. of the treaty

<sup>a</sup> See Art. IV. of the reciprocity treaty of 1854.

<sup>b</sup> For. Rel. 1883, 413, 435, 441, 451, 464; For. Rel. 1884, 214-215. See, also, H. Ex. Doc. 434, 50 Cong. 1 sess.

<sup>c</sup> See speech of Mr. Hitt, House of Representatives, Sept. 4, 1888, Cong. Record, 50 Cong. 1 sess. XIX. 8272, 8274-8275.

of Ghent, the British commissioner offered to enter and ascend the Pigeon River and proceed by a certain water communication to Lake Namekan, *provided that the Grand Portage should remain free to both parties.* The Government of the United States held that the powers of the American commissioner under the treaty did not authorize him to enter into such an engagement, but added:

"Any stipulation that the Grand Portage should remain free to both parties is, moreover, unnecessary according to the principles which the Government of the United States considers applicable to the subject. Agreeably to these principles, both parties, Great Britain and the United States, have the right of navigation from the highest navigable source of the Lakes to the sea, through all the water communications by which they are connected with one another, or with the ocean. To enter into a stipulation by which that right shall be affirmed in regard to any particular link of that chain, would therefore not only be superfluous, but might bring into question the soundness of those principles in their application to other parts of the same chain."

Mr. Clay, Sec. of State, to Mr. Porter, Nov. 13, 1826, 21 MS. Dom. Let. 422.

A question of a different kind was referred to in a letter of Mr. Buchanan, Secretary of State, to the governors of the States of New York and Vermont, communicating to them a copy of a note and accompanying memorial received at the Department of State from the British chargé d'affaires ad interim at Washington, remonstrating on behalf of certain inhabitants of Canada against the placing of any impediment in a position to interrupt the navigation of the waters connecting Missisquoi Bay with the River Richelieu. The Missisquoi Bay, it may be observed, lies in Canada on the east and the Richelieu River on the west of a tongue of land that extends down into Lake Champlain about a sixth of a degree of latitude below the line that divides the States of New York and Vermont from the British possessions, so that it was necessary to round this point in United States waters in order to navigate between the river and the bay. Mr. Buchanan, in communicating the copy of the note and memorial, said: "Although the Federal Government does not admit the right of the Canadian authorities to interfere in this matter, yet I have deemed it due to our amicable relations with Great Britain to transmit this application to your excellency. This has been done under the conviction it will receive that degree of consideration to which it may be justly entitled, proceeding, as it does, from the subjects of a friendly power in a neighboring province." (Mr. Buchanan, Sec. of State, to the governors of New York and Vermont, April 7, 1848, 36 MS. Dom. Let. 405.)

By Article VII. of the Webster-Ashburton treaty of August 9, 1842, it is "agreed that the channels in the river St. Lawrence on both sides of the Long Sault Islands and of Barnhart Island, the channels in the river Detroit on both sides of the island Bois-Blanc, and be-

tween that island and both the American and Canadian shores," and all the several channels and passages between the various islands lying near the junction of the river St. Clair with the lake of that name, shall be equally free and open to the ships, vessels, and boats of both parties;" while by Article II. of the same treaty it is declared to be "understood that all the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the citizens and subjects of both countries."

(5) USE OF CANALS.

§ 140.

By Article IV. of the reciprocity treaty of 1854 the right to navigate the canals in Canada used as part of the water communication between the Great Lakes and the Atlantic Ocean was temporarily secured to the inhabitants of the United States; while the Government of the United States engaged to urge the State governments to permit British subjects to use the several

<sup>a</sup> In June, 1895, the American tug *Grace A. Ruelle*, while towing a scow loaded with garbage from Detroit to a dumping place in Lake Erie, was arrested by Canadian officials at a point in Detroit River, on the British side of the boundary, between the island Bois-Blanc and the Canadian shore, and was taken to Amherstburg, in the township of Malden, Province of Ontario, where the master and crew were eventually charged with bringing a scow loaded with garbage into the township of Malden, and on this charge were tried, convicted and fined. "It is clear that under the treaty, which opens the Canadian as well as the American waters of the river to American navigation at this point, the mere passage of a boat loaded with garbage through that part of the township of Malden which covers the open channel of the river is not a violation of the municipal health laws or regulations of that township. . . . The stoppage of the garbage-laden barge and the conveyance of it into the harbor of Amherstburg was the work of Canadian officials, whose forcible intervention prevented the passage of the garbage onward to its original and lawful destination." (Mr. Olney, Sec. of State, to Mr. Bayard, amb. to England, April 14, 1896, MS. Inst. Gr. Br. XXXI. 421.)

It having been intimated, with reference to projected improvements in the Detroit River by the U. S. Engineer Corps, that the collector of customs at Amherstburg would seize any American plant working in Canadian waters, the British ambassador at Washington was requested, in view of the pleasant relations which had previously prevailed in the prosecution of the work and of the benefit Canada would derive from it, to obtain the permission of the Dominion authorities for the improvements to be proceeded with "along the best lines without regard to the exact location of the international boundary line." (Mr. Gresham, Sec. of State, to Sir J. Pauncefote, Brit. amb., July 6, 1893, MS. Notes to Gr. Br. XXII. 352.)

See Webster's Works, VI. 351-352.

State canals on terms of equality with the inhabitants of the United States. This treaty came to an end in 1866.

“Your letter of the 13th instant respecting the claim of Owen Thorn, deceased, has been received. In reply I have to state that the claim was first presented to the Department in October, 1866, by Mr. Thorn, and the papers were referred to the law officer, who reported as his opinion that they did not furnish the basis for any reclamation upon the British Government, and Mr. Thorn was informed in person of the conclusion arrived at by the Department. By reference to the document enclosed with your letter, being House Ex. Doc. No. 3, 41st Cong. 1st session, you will observe that the detention of Mr. Thorn’s steamer, the *Congress*, the ground of the claim, was caused by the refusal of the Canadian authorities to allow the vessel to proceed through the Canadian canals to Buffalo. This was after the abrogation of the reciprocity treaty with Great Britain, and when, in the opinion of the law officer, the Canadian authorities had an unqualified right to exclude American vessels from their canals without assigning any reason. That they delayed for some days in allowing this privilege to the *Congress*, in consequence of a misapprehension of the purpose of her voyage, did not, in his opinion, subject them to any liability they would not otherwise have sustained.”

Mr. Bayard, Sec. of State, to Mr. Cummings, March 22, 1888, 167 MS. Dom. Let. 540.

By Article XXVII. of the treaty of Washington of May 8, 1871. Great Britain engaged “to urge upon . . . the Dominion of Canada to secure to the citizens of the United States the use of the Welland, St. Lawrence, and other canals in the Dominion on terms of equality with the inhabitants of the Dominion,” while the United States engaged to grant to British subjects the use of the St. Clair Flats Canal “on terms of equality with the inhabitants of the United States,” and further “to urge upon the State governments to secure to the subjects of Her Britannic Majesty the use of the several State canals connected with the navigation of the lakes or rivers traversed by or contiguous to the boundary line . . . on terms of equality with the inhabitants of the United States.”

The ratifications of the treaty were exchanged June 17, 1871. On the 29th of the following November the President addressed the governors of the States of New York, Indiana, Illinois, Michigan, Ohio, Pennsylvania, and Wisconsin, calling their attention to Article XXVII. and urging appropriate action thereunder.<sup>a</sup> In 1874 the British minister complained that Canadian vessels were not permitted to use the Champlain Canal from Whitehall to Albany, N. Y.

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<sup>a</sup> For. Rel. 1871, 531.

Upon investigation it appeared that the State of New York gave British subjects equal rights and privileges with American citizens in navigating all the canals of the State.<sup>a</sup> Further correspondence, not printed, disclosed that the cause of the complaint was certain customs regulations, with regard to which the Treasury Department issued instructions which were satisfactory to the Canadian government.<sup>c</sup>

“Referring to previous correspondence upon the subject of the navigation of canals of the United States by Canadian vessels, under Article XXVII. of the treaty of Washington, I have now the honor to inform you that I am informed by the Secretary of the Treasury that instructions have been issued to the collector of customs at Plattsburg, New York, to allow Canadian barges and other vessels laden with imported goods to pass that port, on a clearance to Albany, or to any port intermediate between Plattsburg and Albany, under such conditions and regulations as would govern the navigation of American barges or vessels coming from Canada, under section 3102 of the Revised Statutes, or under such regulations as would apply to foreign vessels generally when importing foreign cargoes under section 4347 of the Revised Statutes, but without regard to the several provisions in this section which apply especially to imported goods transported in bond. I am further informed that the collector has been instructed to allow free transit to all return cargoes shown by the manifests of Canadian vessels to be destined for Canada.

“It is further stated that instructions, similar in tenor and object to those addressed to the collector at Plattsburg, will be given to the collectors of customs at Buffalo and Oswego, New York, and Burlington, Vermont, and that the surveyor of customs at Albany and the deputy collector at Troy, New York, will be notified of these orders.”

Mr. Fish, Sec. of State, to Sir Edward Thornton, Brit. min., June 7, 1876, MS. Notes to Great Britain, XVII. 179.

In 1895 the United States and Canada each appointed three commissioners to confer on the question of the feasibility of building such canals as should enable vessels engaged in ocean commerce to pass to and fro between the Great Lakes and the Atlantic Ocean. This action was taken on the initiative of the United States under an act of Congress approved March 2, 1895.

For. Rel. 1895, I. 705-707; report of Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxxiv.

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<sup>a</sup> For. Rel. 1875, I. 642, 646, et seq.

<sup>b</sup> Mr. Foster, Sec. of State, to Mr. Spaulding, Assist. Sec. of Treas., Sept. 16, 1892, 188 MS. Dom. Let. 211.



In 1888,<sup>a</sup> and again in 1891, representations were made by the Question as to United States that the stipulated equality in the use of the canals was denied in Canada. The tolls charged on grain, flour, and certain other articles passing through the Welland Canal amounted to 20 cents a ton, but for some years by an annual order in council issued before the opening of lake navigation a rebate of 18 cents a ton was granted on grain carried to Montreal or points east thereof. The effect of this system, which violated, as the United States maintained, the stipulated equality, was aggravated by the ultimate denial of any rebate on cargoes transshipped, as often was necessary, for passage through the canal from larger to smaller vessels if the transfer was made in a United States port. On April 4, 1892, a new order in council was issued, which, while fixing the canal tolls at 20 cents a ton on freight of all kinds, allowed a rebate of 18 cents on wheat, Indian corn, pease, barley, rye, oats, flaxseed, and buckwheat originally shipped and actually carried to Montreal or any port east thereof in case such products were exported, and provided that the right to the rebate should not be lost by intermediate transshipment, if it took place in Canada.<sup>b</sup> By another order in council, dated April 11, 1890, and mentioned by the United States as a discrimination, the toll on cargoes bound eastward was reduced from 20 cents to 10 cents a ton, while the full rate was continued on cargoes bound westward.

The Canadian government argued (1) that its orders in council, as they applied to Canadian and American *vessels* alike, did not infringe the treaty, and (2) that, as Article XXX. of the treaty of Washington, granting a reciprocal participation in special coasting-trade and bonded-transit privileges, expressly authorized the United States to suspend those privileges in case Canada should deny the equal use of the canals under Article XXVII., and as Article XXX. had been terminated on notice given by the United States, the agreed penalty for any discrimination which might exist had already been exacted.<sup>c</sup> The Canadian government proposed, however, as a compromise, to abolish all rebates on condition that the free and equal use of the Sault Ste. Marie Canal should be maintained, and that Article XXX. of the treaty of Washington should be restored.<sup>d</sup>

The United States replied (1) that the treaty guaranteed equality of treatment not merely to *vessels* of the United States, but also to their citizens; (2) that this equality was violated by the system in

<sup>a</sup> For. Rel. 1888, I. 813, 816, 824-825. See, also, special message of President Cleveland to Congress, Aug. 23, 1888, H. Ex. Doc. 434, 50 Cong. 1 sess. 7.

<sup>b</sup> For. Rel. 1892, 277, 278-281, 282, 283, 294.

<sup>c</sup> Id. 277, 278-281.

<sup>d</sup> Id. 286-287, 328.

question, since it required grain bound to United States ports to pay ten times as much toll as grain bound to Montreal, and discriminated against American vessels, ports, consumers, and trade routes; (3) that the termination of Article XXX. of the treaty of Washington, by a notice given in conformity with Article XXXIII. thereof, could on no theory be held to have forever exhausted the power of the United States to retaliate for any failure of Canada to observe the engagements of Article XXVII.; and (4) that clear rights conferred on citizens of the United States by treaty could not be purchased by concessions which the same treaty did not require.<sup>a</sup>

The matter was submitted by the President to Congress,<sup>b</sup> and by an act approved July 26, 1892, it was made his duty, whenever he should be satisfied that the passage through the Canadian canals of vessels of the United States, or of cargoes or passengers bound to a United States port, was prohibited, made difficult, or burdened by tolls which, in view of the free passage permitted to all vessels through the St. Marys Falls Canal, he should deem unjust and unreasonable, to suspend by proclamation such free passage and impose tolls, not exceeding a certain amount on vessels of subjects of the discriminating government or on cargoes or passengers in transit to its ports. A proclamation, dated Aug. 18, was issued Aug. 20, 1892.<sup>c</sup>

It specified as the particular ground of action the rebate allowed under the order in council of April 4, 1892, in favor of the Montreal route and Canadian transshipments, this preferential treatment constituting, as was declared in the correspondence, "the concrete condition of disfavor to citizens of the United States, which the President was constrained to examine and act upon;"<sup>d</sup> and directed the collection, after September 1, 1892, of a toll of 20 cents a ton "on all freight . . . passing through the St. Marys Falls Canal in transit to any port of the Dominion of Canada, whether carried in vessels of the United States or of other nations."<sup>e</sup>

<sup>a</sup> For. Rel. 1892, 251-254, 272-274, 286-287, 302-303, 327, 335.

<sup>b</sup> Message of June 20, 1892, S. Ex. Doc. 114, 52 Cong. 1 sess., with a report of Mr. Partridge, solicitor of the Department of State, showing the nature and effect of the various discriminations; message of July 1, 1892, S. Ex. Doc. 114, 52 Cong. 1 sess., part 2, with a report to Mr. Adee, Second Assistant Secretary of State, on the same subject. See also For. Rel. 1892, 282, 287; and Memorandum of the Canadian Department of Railways and Canals, Nov. 18, 1892, *id.* 328.

<sup>c</sup> For. Rel. 1892, 339.

<sup>d</sup> *Id.* 301, 302-304.

<sup>e</sup> As to the proclamation of August 18, 1892, see further, President Harrison's annual message of Dec. 6, 1892. "The American canals connected with the navigation of the Great Lakes and the St. Lawrence River, except as modified by the President's proclamation of August 28th last, are not only enjoyed by Canadians on equal terms with Americans, but are actually enjoyed by them free of all tolls whatever. Those belonging to the Government of the United States are

By a Canadian order in council of February 13,<sup>a</sup> 1893, it was directed that "for the season of 1893 the canal tolls for the passage of the following food products, wheat, Indian corn, pease, barley, rye, oats, flaxseed, and buckwheat, for passage eastward through the Welland Canal be 10 cents per ton; and for passage westward through the St. Lawrence canals only 10 cents per ton; payment of the said toll of 10 cents per ton for passage through the Welland Canal to entitle these products to free passage through the St. Lawrence canals."

On the strength of assurances that this order was in full substitution of the expired orders of 1891 and 1892, and involved the abandonment of all provisions as to rebates or against transshipped goods, the President, February 21, 1893, issued a proclamation suspending that of August 18, 1892.<sup>a</sup>

By an order in council, dated April 17, 1896, all fees previously exacted from vessels navigating inland waters, when entering or clearing above Montreal, were abolished. It was stated that the Canadian government, while maintaining its former contention that certain charges exacted in United States ports from Canadian vessels constituted a discrimination in favor of United States ships, took the action above stated in order that no cause for friction with the United States authorities in regard to the matter should exist.<sup>b</sup>

(6) RULES OF NAVIGATION.

§ 141.

February 21, 1895, Mr. Gresham, who was then Secretary of State, communicated to the British ambassador at Washington a copy of an act of Congress of February 8, 1895, entitled "An act to regulate navigation on the Great Lakes and other connecting and tributary waters." The hope was expressed that the Canadian government might be disposed to adopt similar regulations for the government of Canadian vessels in the waters in question.<sup>c</sup> Negotiations on the subject were postponed pending a settlement of the general question of revised regulations for the prevention of collisions at sea.<sup>d</sup>

In a note of June 4, 1896, Sir Julian Pauncefote, referring to the expressed desire of the United States that rules for the navigation of

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supported by it, and those belonging to the State of New York are supported by a direct tax upon her people. As to the latter, see p. 38 of S. Ex. Doc. 114, 52 Cong. 1 sess." (Mr. Foster, Sec. of State, to Mr. Spaulding, Assist. Sec. of Treas., Sept. 16, 1892, 188 MS. Dom. Let. 211.)

<sup>a</sup> For. Rel. 1893, 329-331, 337-340.

<sup>b</sup> For. Rel. 1896, 364.

<sup>c</sup> For. Rel. 1895, I. 714-718, containing the text of the act.

<sup>d</sup> Id. 719.

the Great Lakes should not be postponed pending the general question of the revised regulations for the prevention of collisions at sea, stated that Lord Salisbury observed that the main difference between the rules desired by Canada and those desired by the United States had reference to the question of sound signals for use in a fog. This question, so far as it concerned the high seas, had lately been resubmitted by Her Majesty's Government to a committee of the House of Commons, whose report had just been received. It would have to be carefully considered, and meanwhile the board of trade was unable to form a definite opinion as to the merits of the conflicting proposals of Canada and the United States.\*

In 1891 the navigation of steamers on the Great Lakes was governed by the Congressional rules and regulations act of April 29, 1864, 13 Stat. 58, R. S. § 4233, and, so far at least as to manœuvres in American waters, by the supervising inspector's rules then in force. The Revised International Regulations of 1885, act of March 3, 1885, 23 Stat. 483, applied only to navigation "upon the high seas and in all coast waters of the United States," an express exception being made of "the harbors, lakes, and inland waters of the United States," the term *lakes* including the Great Lakes.

The New York (1899), 175 U. S. 187, 193.

"We are saved, however, consideration of these questions [as to the respective duties of vessels navigating the Great Lakes] by the fact that the signals and the steering rules of the United States and Canada are practically identical. This fact being once established, the duty of vessels of both nations in meeting each other, either upon American or Canadian waters, is easily understood."

The New York (1899), 175 U. S. 187, 199.

#### (7) WRECKING PRIVILEGES.

#### § 142.

"On the 15th of July, 1878, Mr. F. W. Seward, Acting Secretary of State, transmitted to Sir Edward Thornton a copy of an act of Congress approved June 19, 1878, entitled 'An act to aid vessels wrecked or disabled in the waters coterminous to the United States and the Dominion of Canada.'

"Mr. Seward, in submitting said act of Congress for the information of Her Britannic Majesty's Government, called attention to the fact that it could not take effect until the President should issue a proclamation declaring that reciprocal privileges would be granted to

\* For. Rel. 1896, 365-366, referring to For. Rel. 1895, I. 714.

American vessels in Canadian waters, and he therefore requested that he might, at as early a date as might be convenient, be placed in possession of the information necessary to enable this Government to carry the above-mentioned act into effect in accordance with its provisions.

"Sir Edward Thornton, in reply to Mr. Seward's note, on the 19th of August 1878, stated that no provision had yet been made by the government of the Dominion of Canada for extending reciprocal privileges to American vessels, but that the subject would receive consideration. Here, however, the matter appears to have rested, no formal reply having ever been made to the proposal communicated to Her Britannic Majesty's Government by Mr. Seward.

"Meanwhile, experience has shown that the want of the proposed reciprocal arrangement has been the source of much avoidable hardship to the interests of American commerce on the Great Lakes, and that American vessels and property have been subjected to great and unnecessary losses and the lives of our mariners to needless dangers.

"It is thought that the adoption of the measure of reciprocity proposed by the act of Congress of June 19, 1878, would remedy the evils in question, as well as promote the interests of good neighborhood and humanity. The President therefore is desirous that the subject may be resubmitted to the consideration of Her Britannic Majesty's Government with the hope that some understanding may be arrived at for the mutual benefit of the important interests concerned."

Mr. Bayard, Sec. of State, to Mr. West, Brit. min., Feb. 26, 1886, MS. Notes to Great Britain. XX. 196.

"It is much to be desired that some agreement should be reached with Her Majesty's Government by which the damages to life and property on the Great Lakes may be alleviated by removing or humanely regulating the obstacles to reciprocal assistance to wrecked or stranded vessels.

"The act of June 19, 1878, which offers to Canadian vessels free access to our inland waters in aid of wrecked or disabled vessels, has not yet become effective through concurrent action by Canada." (President Cleveland, annual message, Dec. 3, 1888, For. Rel. 1881, I. p. xli.)

By an act of Congress of May 24, 1890,<sup>a</sup> it was provided that Canadian wreckers might render aid to "Canadian or other vessels and property, wrecked, disabled or in distress" in United States waters contiguous to the Dominion of Canada, whenever the President should proclaim that a reciprocal privilege was extended by Canada to American wreckers as to American or other vessels and property in contiguous Canadian waters; and it was expressly declared that the act should be construed to apply to "the Welland Canal, the canal and improvement of the waters between Lake Erie

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<sup>a</sup> 26 Stat. 120.

and Lake Huron, and to the waters of the St. Marys River and Canal." Canada, on May 10, 1892, passed a reciprocal act, but the words "waters of Canada contiguous to the United States," as employed in it, were not declared to apply to the canals and other waters above mentioned. It was afterwards ascertained that Canada did not intend her law to apply to the canals, since they were not "waters contiguous to the United States," but "were bounded on both sides by Canadian territory." The United States, on the other hand, maintained that the canals connected with the navigation of the Great Lakes, though they might not, when lying wholly within one country, be "contiguous waters" in the strictest sense, were incidental to waters which were so contiguous, and were important parts of the system of waterways for which reciprocal wrecking privileges were intended to be secured; and in view of the express requirements of the United States law it was held that the President's proclamation could not issue.<sup>a</sup> Moreover, regulations subsequently adopted in Canada for the enforcement of her statute in the Welland Canal permitted American wreckers to aid only American vessels, and, by omission, apparently excluded the salvage of property wrecked. A question was also raised as to whether an American tug would be permitted to pull off its own tow if grounded or wrecked.<sup>b</sup>

By the legislative, executive, and judicial appropriation act of March 3, 1893, the act of May 24, 1890, was amended by striking out the words "the Welland Canal."<sup>c</sup>

Whereas an Act of Congress amendatory of an Act in relation to aiding vessels wrecked or disabled in the waters conterminous to the United States and the Dominion of Canada, was approved May 24, 1890,—the said Act being in the following words:—

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an Act entitled 'An act to aid vessels wrecked or disabled in the waters conterminous to the United States and the Dominion of Canada,' approved June nineteenth, eighteen hundred and seventy-eight, be, and the same is hereby, amended so that the same will read as follows:*

*"That Canadian vessels and wrecking appurtenances may render aid and assistance to Canadian or other vessels and property wrecked, disabled, or in distress in the waters of the United States contiguous to the Dominion of Canada: Provided, That this act shall not take effect until proclamation by the President of the United States that the privilege of aiding American or other vessels and property*

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<sup>a</sup> For. Rel. 1892, 277, 289, 291, 292, 304, 305-309,

<sup>b</sup> Id. 331-335.

<sup>c</sup> For. Rel. 1893, 336.

wrecked, disabled, or in distress in Canadian waters contiguous to the United States has been extended by the Government of the Dominion of Canada to American vessels and wrecking appliances of all descriptions. This act shall be construed to apply to the Welland Canal, the canal and improvement of the waters between Lake Erie and Lake Huron, and to the waters of the Saint Mary's River and canal: *And provided further*, That this act shall cease to be in force from and after the date of the proclamation of the President of the United States to the effect that said reciprocal privilege has been withdrawn, revoked, or rendered inoperative by the said Government of the Dominion of Canada ;'

And Whereas an act of Congress making appropriation for the legislative, executive and judicial expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-four, and for other purposes, approved March 3, 1893, further amended the act of May 24, 1890, as follows:

"That an act approved May twenty-fourth, eighteen hundred and ninety, entitled 'An act to amend an act entitled "An act to aid vessels wrecked or disabled in waters coterminous to the United States and the Dominion of Canada,"' approved June nineteenth, eighteen hundred and seventy-eight, be, and is hereby, amended by striking out the words 'the Welland Canal.'

And Whereas by an Order in Council dated May 17, 1893, the Government of the Dominion of Canada has proclaimed an act entitled "An act respecting aid by United States wreckers in Canadian waters," to take effect June 1, 1893, said act reading as follows:

"Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

"1. United States vessels and wrecking appliances may save any property wrecked, and may render aid and assistance to any vessels wrecked, disabled, or in distress, in the waters of Canada contiguous to the United States.

"2. Aid and assistance include all necessary towing incident thereto.

"3. Nothing in the customs or coasting laws of Canada shall restrict the salving operations of such vessels or wrecking appliances.

"4. This act shall come into force from and after a date to be named in a proclamation by the Governor-General, which proclamation may be issued when the Governor in council is advised that the privilege of salving any property wrecked or of aiding any vessels wrecked, disabled, or in distress, in United States waters contiguous to Canada, will be extended to Canadian vessels and wrecking appliances to the extent to which such privilege is granted by this act to United States vessels and wrecking appliances.

"5. This act shall cease to be in force from and after a date to be named in a proclamation to be issued by the Governor-General to the effect that the said reciprocal privilege has been withdrawn, revoked or rendered inoperative with respect to Canadian vessels or wrecking appliances in United States water contiguous to Canada;"

And Whereas said proclamation of the Governor-General of Canada was communicated to this Government by Her Britannic Majesty's Ambassador on the 2d day of June last:—

Now, THEREFORE, being thus satisfied that the privilege of aiding American or other vessels and property wrecked, disabled, or in distress, in Canadian waters contiguous to the United States has been extended by the Government of the Dominion of Canada to American vessels and wrecking appliances of all descriptions, I, GROVER CLEVELAND, President of the United States of America, in virtue of the authority conferred upon me by the aforesaid act of Congress, approved May 24, 1890, do proclaim that the condition specified in the legislation of Congress aforesaid now exists and is fulfilled and that the provisions of said act of May 24, 1890, whereby Canadian vessels and wrecking appliances may render aid and assistance to Canadian and other vessels and property wrecked, disabled or in distress, in the waters of the United States contiguous to the Dominion of Canada, including the Canal and improvement of the waters between Lake Erie and Lake Huron and the waters of the Saint Mary's River and Canal, are now in full force and effect.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States of America to be hereunto affixed.

DONE at the City of Washington this seventeenth day of July in the year of our Lord one thousand eight hundred and ninety-three and of the Independence of the United States the one hundred and eighteenth.

[SEAL.]

GROVER CLEVELAND

By the President

W. Q. GRESHAM

*Secretary of State.*

This proclamation is printed in For. Rel. 1893, 344, and in Richardson's Messages and Papers of the Presidents, IX. 396. For the Canadian order in council of May 17, 1893, see For. Rel. 1893, 341, 342-344.

In communicating to the British embassy at Washington the clause in the act of March 3, 1893, striking out of the act of May 24, 1890, the words "the Welland Canal." the Department of State proposed an arrangement "covering the ordinary disabilities to which self-propelled or towed vessels are liable in passing through inland canals, so that legitimate and timely assistance, on the part of an American vessel may be freely rendered in such cases," and declared that the President stood ready to issue his proclamation, coincidently with



similar action by Canada, on being assured that the application of the legislation of the two countries "in the territorial waterways of the Dominion to the commerce passing through the channels that connect the lakes will be as liberal as that proposed to be made in the American territorial waters." (Mr. Gresham, Sec. of State, to Sir J. Pauncefote, Brit. amb., March 24, 1893, For. Rel. 1893, 334.)

This proposal remained unanswered when the President issued his proclamation. (For. Rel. 1893, 344; Mr. Adee, Act. Sec. of State, to Sir J. Pauncefote, Brit. amb., "personal," July 24, 1893, MS. Notes to Gr. Br. XXII. 358.)

Reply, however, was subsequently made to the effect that the privileges conferred by the Canadian act of 1893 were expressly exempted from the restrictions of the coasting laws of Canada; that "pending a consideration of the broader question of a general reciprocity in coasting and towing, it is not necessary to modify existing regulations;" but that the Canadian government was willing to enter into negotiations or to receive proposals "on the general question." (Sir J. Pauncefote, Brit. amb., to Mr. Gresham, Sec. of State, Aug. 31, 1893, For. Rel. 1893, 347, enclosing a certified copy of an approved minute of the privy council of Canada of Aug. 15, 1893.)

At the same time it was stated "that though at the conference held at Washington in February, 1892, it was agreed that instructions should be issued by the United States Treasury Department to authorize the necessary towing incidental to the wrecking and salvage contemplated by the act of Congress, and to provide for the relaxation of the customs laws, no such instructions have yet been issued." (Sir J. Pauncefote, Brit. amb., to Mr. Gresham, Sec. of State, Aug. 31, 1893, For. Rel. 1893, 348.)

Oct. 5, 1893, Mr. C. S. Hamlin, Acting Secretary of the Treasury, issued to "collectors of customs and others" the following circular:

"The attention of collectors and other officers of the customs upon the northern frontiers of the United States is invited to the President's proclamation, dated July 17, 1893, relative to reciprocity of wrecking between the United States and Canada.

"The Acting Secretary of State, under date of the 30th ultimo, recommends that further regulations regarding the matter be promulgated by this Department, and states that during the visit of the Canadian commissioners to Washington in October last the subject of reciprocal privileges in wrecking was under consideration, and that a declaration was then made on the part of the Government of the United States that under the act of Congress, approved May 24, 1890, relating to vessels wrecked or disabled in the waters contiguous to the United States and Canada, the aid and assistance provided for in said act includes all necessary towing incident to said aid and assistance, and that nothing in the coasting or customs laws of this country restricts the saving operations of such vessels and their appliances.

"The proclamation, and the act of May 24, 1890, on which it was based, are embodied in this Department's Circular No. 114, dated July 28, 1893, and should be construed and observed by all customs officers in such a manner as to give due effect to the declaration aforesaid, in case of Canadian vessels and wrecking appliances rendering aid and assistance to Canadian and other vessels and property wrecked, dis-

abled, or in distress in the waters of the United States contiguous to the Dominion of Canada, including the canal and improvements of the waters between Lake Erie and Lake Huron and the waters of the St. Marys river and canal. In case of doubt as to the action which should be taken in any case the Department will give special instructions.

"Similar regulations have been made by the Canadian Government." (For. Rel. 1893, 351.)

Dec. 13, 1893, the British ambassador at Washington communicated to the Department of State a circular of the Canadian Department of Trade and Commerce of Nov. 7, 1893, as follows:

"I am desired by the honorable the minister of trade and commerce to direct the attention of all persons interested to the following:

"At the conference held at Washington in February, 1892, between delegates of the Canadian Government and representatives of the United States Government, among other things discussed was the subject of reciprocal wrecking privileges in waters common to Canada and the United States, and it was then agreed that the subject should be dealt with by legislation on the part of Canada and by such instructions from the Treasury Department of the United States as might be necessary to give to the act of Congress on the subject such liberal construction as would include permission for all towing necessary and incidental to wrecking and salvage, and the relaxation of customs laws in so far as might be necessary to make the reciprocal arrangements effective. (*Vide* Sessional Papers No. 52, 1893.)

"In pursuance of this agreement the Parliament of Canada, at its next ensuing session, passed the act 55-56 Vic., chap. 4, intituled 'An act respecting aid by United States wreckers in Canadian waters,' and upon being apprised that the act of Congress approved June 19, 1878, entitled 'An act to aid vessels wrecked or disabled in waters common to the United States and the Dominion of Canada,' as amended by an act approved May 24, 1890, had been further amended by an act approved March 3, 1893, his excellency the Governor-General issued his proclamation on May 17, 1893, bringing the said act 55-56 Vic., chap. 4, into force on and after the 1st day of June, 1893, which said proclamation was communicated to the United States Government by Her Majesty's ambassador at Washington on the 2d day of June, 1893, whereupon the President of the United States issued on the 17th day of July, 1893, his proclamation declaring the act of Congress above referred to to be from that time in full force and effect.

"Under date of the 5th October, 1893, the Secretary of the Treasury of the United States issued a circular letter of instructions relative to the construction to be given to the act of Congress and relative to all necessary towing incidental to any wrecking or salvaging, and to such relaxation of United States customs laws as appeared necessary in order to give full effect to reciprocal wrecking, etc., in the waters common to the two countries.

"Appended are copies of the act 55-56 Vic., chap. 4, of his excellency's proclamation of the 17th May last, of the President's proclamation of the 17th July last, which embodies the act of Congress as amended, and of the United States Treasury circular of the 5th October, all above referred to." (For. Rel. 1893, 353.)

In a case of salvage off Denman Island, Strait of Georgia, about 80 miles north of the boundary between the United States and Canada, the two Governments concurred in the view that the waters in which the wrecked ship lay were not "contiguous" in the sense of the arrangement. (Memorandum, May 8, 1901, MS. Notes to Brit. Leg. XXV. 534.)

"The arrangement in question is not in terms confined to the lakes and the waterways connecting them, but includes the 'contiguous waters' dividing the United States and Canada. No precise definition of such waters at the Atlantic and Pacific extremities of the common boundary has been reached between the two countries, and until a case shall arise presenting the question for settlement this Department could not prejudge the matter by a hypothetical opinion, further than to say that the clear sense of the phrase 'Canadian waters contiguous to the United States' would necessarily exclude the Gulf of St. Lawrence and the Atlantic coasts of Nova Scotia, and perhaps also the Bay of Fundy except as to that part of its waters which forms the conventional boundary between the United States and the possessions of Great Britain." (Mr. Gresham, Sec. of State, to Mr. Randall, Aug. 18, 1893, 193 MS. Dom. Let. 190.)

See also Mr. Day, Assist. Sec. of State, to Mr. Scott, Feb. 26, 1898, 226 MS. Dom. Let. 49.

Section 4370, Revised Stats., which imposes a penalty on foreign steam tugs "found employed in towing documented vessels of the United States plying from one port or place in the same to another," does "not apply to any case where the towing, in whole or in part, is within or upon foreign waters." (See, as to the reciprocal observance of this rule on the Great Lakes, Mr. Bayard, Sec. of State, to Mr. Fairchild, Sec. of Treasury, May 18, 1887, 164 MS. Dom. Let. 201, enclosing copy of a note from the British minister of May 10, 1887.)

#### (8) LIMITATION OF NAVAL FORCES.

#### § 143.

"The information you give of orders having been issued by the British Government to increase its naval force on the lakes is confirmed by intelligence from that quarter of measures having been actually adopted for the purpose. It is evident, if each party augments its force there with a view to obtain the ascendancy over the other, that vast expense will be incurred and the danger of collision augmented in like degree. The President is sincerely desirous to prevent an evil which it is presumed is equally to be deprecated by both Governments. He therefore authorizes you to propose to the British Government such an arrangement respecting the naval force to be kept on the lakes by both Governments as will demonstrate their pacific policy and secure their peace. He is willing to confine it on each side to a certain moderate number of armed vessels, and the smaller the number the more agreeable to him; or to abstain altogether from an armed force beyond that used for the revenue. You will

bring this subject under the consideration of the British Government immediately after the receipt of this letter."

Mr. Monroe, Sec. of State, to Mr. Adams, mln. to England, Nov. 16, 1815,  
MS. Inst. U. States Ministers, VIII. 3; H. Doc. 471, 56 Cong. 1 sess. 5.

The proposal embodied in the foregoing instruction was duly submitted by Mr. Adams to Lord Castlereagh, who was disinclined to accede to it, on the ground that a mutual stipulation against arming during peace would, by reason of the advantage of position enjoyed by the United States, be unequal and disadvantageous in its operation to Great Britain.<sup>a</sup> Subsequently, however, on the proposals being renewed, Lord Castlereagh decided to accept it, and authorized Mr. Bagot, the British minister at Washington, to conclude an arrangement on the subject.<sup>b</sup> Negotiations ensued between Mr. Bagot and the Department of State, resulting in an agreement which was effected by an exchange of notes, dated April 28 and April 29, 1817, and signed, respectively, by Mr. Bagot and by Mr. Rush, who had then succeeded Mr. Monroe as Secretary of State. By this agreement the naval force to be "maintained" by each Government on the Great Lakes was limited, on Lake Ontario, to one vessel not exceeding 100 tons burden and armed with one 18-pound cannon; on the upper lakes, to two vessels not exceeding the same burden and armament; and on Lake Champlain, to one vessel of no greater size and armament. All other armed vessels on the lakes were to be forthwith dismantled, and "no other vessels of war" were to be "there built or armed." This stipulation was to remain in effect till six months after either party should have given notice to the other of a desire to terminate it.

Orders were immediately given by both Governments for carrying the arrangement into effect. April 6, 1818, however, President Monroe, apparently out of abundant caution, communicated it to the Senate, which on April 16, 1818, "approved of and consented to" it and "recommended that the same be carried into effect by the President."<sup>c</sup>

It was formally proclaimed by the President April 28, 1818.<sup>d</sup> No exchange of ratifications took place; but the arrangement became effective, by virtue of executive orders, from the date of the original

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<sup>a</sup> Mr. Adams, mln. to England, to Mr. Monroe, Sec. of State, Jan. 31 and Feb. 8, 1816, H. Doc. 471, 56 Cong. 1 sess. 5. See also Mr. Adams to Mr. Monroe, March 22 and March 30, 1816, *id.* 7.

<sup>b</sup> H. Doc. 471, 56 Cong. 1 sess. 7-9.

<sup>c</sup> Am. State Papers, For. Rel. IV. 202; S. Doc. 301, 15 Cong. 1 sess.; H. Doc. 471, 56 Cong. 1 sess. 15.

<sup>d</sup> 11 Stat. 766. The arrangement is printed in 5 Br. & For. State Papers, 1200-1201.

exchange of notes. Existing legislation gave the Secretary of the Navy ample discretion as to the force to be employed on the lakes. Appropriations for the maintenance of such force were made in general terms.<sup>a</sup>

By the act of March 3, 1813, the President was authorized to provide on the lakes such sloops of war or other armed vessels as the public service might require;<sup>b</sup> and after the treaty of Ghent he was authorized to cause all armed vessels of the United States in those waters, except such as he might deem necessary to enforce the revenue laws, to be sold or laid up, as he might judge most conducive to the public interest;<sup>c</sup> so that, when the arrangement of 1817 was made, the force to be maintained on the lakes was within his discretion. Nor was this discretion impaired by subsequent legislation. On the contrary, he was authorized, by the act of March 3, 1825, to sell "the whole of the public vessels upon Lakes Erie, Ontario, and Champlain, except the ships of the line *New Orleans* and *Chippewa*, now on the stocks, under cover, in Sacketts Harbor."<sup>d</sup> By the act of September 9, 1841, an appropriation was made "for the construction or armament of such armed steamers or other vessels for defense on the northwestern lakes as the President may think proper and as may be authorized by the existing stipulations between this and the British Government."<sup>e</sup>

In 1838 Mr. Forsyth, who was then Secretary of State, called the attention of Mr. Fox, the British minister, in a personal interview, to the presence in Lake Erie of certain vessels which had been hired and armed by the authorities of Upper Canada to prevent apprehended incursions of persons engaged in promoting or renewing the rebellion in that province. Mr. Fox subsequently gave an assurance in writing that the armament in question was "equipped for the sole purpose . . . of guarding Her Majesty's Provinces against a manifest and acknowledged danger," and that it would be "discontinued at the earliest possible period after the causes which now create that danger cease to exist." / The subject was not renewed by Mr. Forsyth till the autumn of 1839, when he stated to Mr. Fox that "the causes assigned in his note no longer existing, the President expected that the British armament upon the Lakes would be placed upon the foot-

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<sup>a</sup> Act of June 12, 1798, 1 Stat. 564; act of April 18, 1814, 3 Stat. 139.

<sup>b</sup> 2 Stat. 821.

<sup>c</sup> Act of Feb. 27, 1815, 3 Stat. 217.

<sup>d</sup> 4 Stat. 131.

<sup>e</sup> 5 Stat. 458, 460.

/ Mr. Fox, Brit. min., to Mr. Forsyth, Sec. of State, Nov. 25, 1838, H. Doc. 471, 56 Cong. 1 sess. 19. See, as to the Canadian disturbances, Moore, Int. Arbitrations, III. 2419 et seq.

ing prescribed by the convention.”<sup>a</sup> Mr. Fox promised to communicate the substance of the conversation to his Government. In 1840, however, owing to the increase of military and naval preparations in Canada, and to rumors that still further preparations were intended, resolutions of inquiry were offered in Congress, and an appropriation was made for the increase of the armaments of the United States.<sup>b</sup>

September 25, 1841, Mr. Webster, who had then become Secretary of State, addressed a note to Mr. Fox, in which, after referring to the latter's note to Mr. Forsyth of November 25, 1838, he stated that information had been received that “two large steam vessels, fitted for warlike service, of 400 or 500 tons burden, and capable of carrying fifteen or twenty guns,” were “built, partially equipped, and ready to receive ordnance,” and then lay at Chippewa; that the United States did not allow itself to doubt that the object of this preparation was “purely defensive, and intended only to guard against attacks like that of 1838;” but that, as it far exceeded the amount of force which was permitted by the stipulations of 1817, it seemed proper to call the attention of the British Government to the subject, to the end that both parties might have a clear understanding upon it. Mr. Webster therefore expressed the hope that Mr. Fox might be able “to give explicit assurances . . . that these vessels of war, if unhappily it shall be found necessary to use them at all, will be confined to the sole and precise purpose of guarding Her Majesty's provinces against hostile attacks.”

Mr. Webster. Sec. of State, to Mr. Fox. Brit. mln., Sept. 25, 1841, MS. Notes to Brit. Leg. VI. 219; extract is in H. Doc. 471, 56 Cong. 1 sess. 23.

No reply to this communication having been received, Mr. Webster, November 29, 1841, again addressed Mr. Fox in a similar sense, but more urgently.<sup>c</sup>

Mr. Fox on the following day gave the desired assurance that the vessels in question had been equipped “for the sole purpose of guarding Her Majesty's provinces against hostile attack,” but stated that, it being notorious that those provinces were “threatened with hostile incursions by combinations of armed men” from the United States, and that the efforts of the United States to suppress such combinations had not been attended with the wished-for success, he should refer Mr. Webster's communications to Her Majesty's Government.

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<sup>a</sup> H. Doc. 471, 56 Cong. 1 sess. 20.

<sup>b</sup> See H. Ex. Docs. 163 and 246, 26 Cong. 1 sess.; H. Doc. 471, 56 Cong. 1 sess. 21-23; 5 Stat. 460.

<sup>c</sup> Mr. Webster. Sec. of State, to Mr. Fox. Brit. mln., Nov. 29, 1841, MS. Notes to British Leg. VI. 223; H. Doc. 471, 56 Cong. 1 sess. 23.

with a view to learn its wishes as to the continuance of the convention.<sup>a</sup>

The correspondence here ended.

In the summer of 1844 the United States put afloat in Lake Erie the side-wheel bark *Michigan*, which was built at Pittsburg and removed in sections to Erie. Her registered tonnage was 498 tons, and she was armed with two 8-inch guns and four 32-pound carronades. The British minister at Washington remonstrated and requested explanations,<sup>b</sup> and the vessel was ordered not to leave Erie till further orders. At the same time it was stated that there was reason to believe that the British Government still had in commission on the lakes a larger force, both in number and tonnage, than was authorized by the agreement of 1817, and it was suggested that, in view of the substitution of steam for sails, and of the increase in the size of vessels, since the agreement was made, a revision of it would be justified.<sup>c</sup>

The *Michigan* appears to have remained in the lakes without further objection till 1856, when Lord Clarendon, though disclaiming any wish or purpose to complain, apprized Mr. Dallas, who was then United States minister in London, that he had been written to respecting the existence at Detroit of a revenue cutter whose size and armament were incompatible with the arrangement of 1817.<sup>d</sup> An inquiry on the subject was subsequently made by Lord Napier.<sup>e</sup> The *Michigan* was not in fact a revenue cutter, but was under the control of the Navy Department. Her presence was again referred to by Lord Lyons in 1861.<sup>f</sup>

In 1864, with a view to enable the United States to take measures against the acts of Confederate agents, who were endeavoring to carry on hostilities from Canadian territory, the House of Representatives adopted a joint resolution looking to the termination of the arrangement of 1818. The resolution was not then considered in the Senate, and in the autumn of 1864 Mr. Seward instructed Mr.

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<sup>a</sup> Mr. Fox, Brit. min., to Mr. Webster, Sec. of State, Nov. 30, 1841, H. Doc. 471, 46 Cong. 1 sess. 24.

<sup>b</sup> Mr. Pakenham, Brit. min., to Mr. Calhoun, Sec. of State, July 23, 1844, H. Doc. 471, 56 Cong. 1 sess. 24-25.

<sup>c</sup> Mr. Calhoun, Sec. of State, to Mr. Pakenham, Brit. min., Sept. 5, 1844, enclosing copy of a letter of Mr. Mason, Sec. of Navy, Sept. 4, 1844, H. Doc. 471, 56 Cong. 1 sess. 25.

<sup>d</sup> Mr. Marcy, Sec. of State, to Mr. Guthrie, Sec. of Treasury, Dec. 16, 1856, 46 MS. Dom. Let. 169; Mr. Marcy, Sec. of State, to Mr. Dobbin, Sec. of Navy, Dec. 23, 1856, 46 MS. Dom. Let. 180.

<sup>e</sup> Lord Napier, Brit. min., to Mr. Cass, Sec. of State, Apr. 9, 1857, H. Doc. 471, 56 Cong. 1 sess. 26.

<sup>f</sup> Lord Lyons, Brit. min., to Mr. Seward, Sec. of State, Aug. 31, 1861, H. Doc. 471, 56 Cong. 1 sess. 27.

Adams, then minister in London, to advise the British Government that the Secretary of the Treasury had chartered two propellers for defensive purposes in Lake Erie and Lake Ontario, and also to give the six months' notice of termination required by the arrangement. This Mr. Adams did November 23, 1864. Pursuant to the terms of the notice, which was afterwards ratified by a joint resolution of Congress, approved February 9, 1865, the arrangement was to terminate on the 23d of the following May. But before that time, with the decline of the Confederate cause, the situation on the border greatly improved, and in March, 1865, Mr. Adams was instructed to say that the United States was "quite willing that the convention should remain practically in force."<sup>a</sup> Mr. Seward subsequently stated, in response to an inquiry on the subject, that the instruction to Mr. Adams "was intended as a withdrawal of the previous notice within the time allowed, and that it is so held by this Government."<sup>b</sup>

Soon after the withdrawal of the notice, Mr. Seward, replying to a request of Sir Frederick Bruce for explanations as to the construction of several vessels prepared for the reception of a powerful armament, which were reported to be destined for service on the Lakes, stated that they were "intended exclusively for revenue purposes, and that their armament, if any, will not be allowed to exceed the limit stipulated in the conventional arrangements."<sup>c</sup>

Mr. Seward had previously stated, in a letter to the Secretary of the Treasury, that he was not "prepared to acknowledge" that the purpose of the arrangement of 1817 "was to restrict the armament or tonnage of vessels designed exclusively for the revenue service."<sup>d</sup>

In the negotiations leading up to the arrangement of 1817 the distinction between naval forces and the revenue service was at times clearly expressed, but the final notes did not record it. But, since Mr. Seward's note to Sir Frederick Bruce, it seems to have been admitted on both sides that the arrangement did not preclude the maintenance of a revenue service. In 1892 the United States revenue service on the Lakes comprised three steamers: The *Perry*, stationed at Erie, 281.54 tons, armed with two 3-inch rifles; the *Fessenden*, at Detroit, 329.81 tons, with one 30-pounder Parrott gun, two 24-pounder Dalghren howitzers, and two 3-inch rifles; the *Johnson*, at Milwaukee, 499 tons, with one 30-pounder Parrott and two 24-

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<sup>a</sup> Mr. Seward, Sec. of State, to Mr. Adams, min. to England, March 8, 1865. H. Doc. 471, 56 Cong. 1 sess. 33.

<sup>b</sup> Mr. Seward, Sec. of State, to Sir F. Bruce, Brit. min., June 16, 1865, H. Doc. 471, 56 Cong. 1 sess. 34.

<sup>c</sup> Mr. Seward, Sec. of State, to Sir F. Bruce, Brit. min., Nov. 4, 1895; H. Doc. 471, 56 Cong. 1 sess. 34.

<sup>d</sup> Mr. Seward, Sec. of State, to Mr. Chase, Sec. of Treasury, May 7, 1864, 64 MS. Dom. Let. 228.



pounder howitzers. It was stated at the same time that two vessels for the Canadian Government had been constructed at Owen Sound, Ontario, which, although styled revenue cutters and destined to suppress smuggling on the St. Lawrence River and the lakes, were capable of adaptation to naval purposes; and that another revenue cutter of similar type had been launched from Hamilton, Ontario. The naval force of the United States on the Lakes in 1892 was confined, as it had been for many years, to the single iron side-wheel steamer *Michigan*, then rating 685 tons and carrying four howitzers. It did not appear that any British or Canadian naval vessels had for many years been stationed on the Lakes.

As the result of the foregoing examination it may be said (1) that the arrangement of 1817 is "to be regarded as still in existence, and only terminable in good faith by six months' notice of abrogation on either side;" (2) that, in respect of the engagement to limit the effective force on each side to four vessels not exceeding 100 tons burden apiece, and each armed with one 18-pounder cannon, it does not respond "to the enormous changes wrought in the conditions of intercourse upon the Lakes;" (3) that the reason of the prohibition to build or arm other vessels of war on the Lakes has been removed by the opening of an outlet by water to the sea; (4) that the arrangement should therefore "be modified to fit the new order of things."

Report of Mr. Foster, Sec. of State, to the President, Dec. 7, 1892, S. Ex. Doc. 9, 52 Cong. 2 sess.; H. Doc. 471, 56 Cong. 1 sess. 4-38.

The report here cited is substantially exhaustive, and the facts embraced in the foregoing summary are taken from it except in a few instances, where additional facts have, as will appear by the footnotes, been taken from the manuscripts.

For the text of correspondence in 1840, and 1864-5, see H. Doc. 471, 56 Cong. 1 sess. 39-62.

See, also, S. Report 449, 55 Cong. 2 sess. reprinted in H. Doc. 471, 56 Cong. 1 sess. 62.

"The records of the Department of Justice do not show that any opinion has been rendered by this Department to the effect that the treaty of 1817 . . . does not now exist." (Mr. Miller, At. Gen., to Sec. of State, Sept. 1, 1892, MSS. Dept. of State.)

See letter of the Hon. Don M. Dickinson to Mr. Herbert, Sec. of Navy, Oct. 17, 1895, arguing that the prohibition to build or arm other vessels of war on the Lakes should not be held to prevent the building of such vessels there, "except they be armed, equipped, and 'maintained' as war-ships on those waters." (MSS. Navy Dept.)

The Navy Department has declined to award contracts for the construction, even in parts, on the Lakes, of war vessels which might be held to contravene the arrangement of 1817. (H. Doc. 471, 56 Cong. 1 sess. 38, 63-64, 67.)

For a list of British and Canadian government vessels on the Great Lakes or in the St. Lawrence River, and capable of running back and forth through the canals, in 1895, see H. Doc. 471, 56 Cong. 1 sess. 65.

'As to the passage of four United States revenue cutters from the Great Lakes to the Atlantic coast after the outbreak of the war with Spain, see *id.* 65-71.

For correspondence in 1898 touching the desire of the United States to construct on the Lakes a vessel to take the place of the U. S. S. Michigan, see *id.* 67-72.

"An agreement was reached between the two Governments on May 30, 1898, for the creation of a joint high commission, to which should be referred for settlement various pending questions between the United States and Canada, among which was 'a revision of the agreement of 1817 respecting naval vessels on the Lakes.' . . . In 1817 the Great Lakes were independent inland waters," there being then "no navigable connection between them and the ocean. Under such circumstances to build and arm vessels on the Lakes meant 'to maintain' them there and to use them for no other purpose than as part of the permanent armament. . . . Moreover, at the time of making the arrangement the region of the Great Lakes was in large measure an uninhabited wilderness. To-day the Lakes are highways for an enormous traffic, and their ports . . . have, among other things, peculiar advantages for the construction of certain classes of war vessels. . . . The American members of the Joint High Commission were therefore instructed to secure some agreement whereby, under proper conditions, such vessels should be constructed and passed through the Canadian canals to the ports of the United States on the Atlantic Ocean.' It was likewise held that a proper construction of the arrangement did not prohibit the maintenance on the Lakes of vessels properly equipped for the purpose of training seamen and reserves in the Middle States, and that the employment of a proper training ship is not necessarily hostile to the spirit of the arrangement and should be so declared. It is understood that some satisfactory progress was made in the Joint High Commission toward the attainment of these ends, but the labors of the commission have been suspended without reaching a definite result."

Report of Mr. Hay, Sec. of State, to the President, Feb. 26, 1900, H. Doc. 471, 56 Cong. 1 sess. 2-3.

## 7. MARGINAL SEA.

### (1) GENERAL PRINCIPLES.

#### § 144.

Perels, in his work on the Admiralty, justifies the doctrine of the territoriality of adjacent waters on the three following grounds: (1) The security of a maritime state requires the possession of its marginal waters; (2) the surveillance of ships which enter those waters, whether passing through or stopping there, is demanded in order to

guarantee the efficient police and the development of the political, commercial, and fiscal interests of the bordering state; (3) the enjoyment of the possession of territorial waters serves to **sustain the existence** of the population on the coast.

Perels, *Seerecht*, §§ 24, 37, 74, 76-88.

See, also, Latour, *La Mer Territoriale au Point de Vue Théorique et Pratique*, Paris, 1889. This author defines the territorial sea as the sea adjacent to the coasts, over which the bordering nation may from the shore employ its armed forces, and thus exercise the power which is necessary to defend its territory and coasts, assure the safety of its inhabitants, and guard its fiscal and commercial interests. In following out his discussion he maintains a distinction between the exercise by a nation of its protective power and the claim of exclusive possession.

See, specially, Territorial Waters, Questionnaire, Replies and Report, in the 15th annual report of the Association for the Reform and Codification of the Law of Nations, Genoa, 1892.

"The principle that the littoral sea forms part of the territory is justified by the exigencies of the conservation and safety of the state, from the military, sanitary, and fiscal point of view, as well as from the point of view of industrial interests, especially that of the fisheries. . . .

"How far does the littoral sea extend? It seems reasonable, in virtue of its object and its accessorial quality, to say that it extends as far from the shore as the territorial power can be defended and maintained, that is to say, to the range of cannon shot. . . .

"Some recent conventional, legislative, or judicial acts have replaced the range of cannon, which varies with the progress of armaments and weapons, by a fixed distance of a marine league, that is to say three marine miles or a twentieth of a degree of latitude," which was formerly the range of cannon shot. "The rational principle of the range of cannon was formulated by Bynkershoek, in chapter 2 of his dissertation *de domino maris* (1703): 'Generaliter dicendum esset, potestatem terrae finiri ubi finitur armorum vis.'"

Rivier, *Droit des Gens*, I. 145, 146, 147. See, also, Latour, *La Mer Territoriale au Point de Vue Théorique et Pratique*, 1889; Barclay, *Annuaire, Institut de Droit Int.* XIII. 125-162; Plocque, *Législation des Eaux et de la Navigation*, 1870-1875; Pradler-Fodéré, *Droit Int.* II. § 617; Perels, *Manuel de Droit Mar. Int.* (trad. Arendt), § 5; A. Geouffre de Lapradelle, *Le Droit de l'État sur la Mer Territoriale*, 1898 (extract from *La Revue Générale de Droit Int. Publie*); Phillimore (3rd ed.), I. 274; Wheaton (Dana's ed.), § 189; Creasey, *First Platform of International Law*, 233; Walker, *Science of Int. Law*, 171.

Chancellor Kent suggested that, considering the long line of American coasts, the United States might claim control of the waters included within lines stretching from distant headlands, as, for instance,

from Cape Ann to Cape Cod, from Nantucket to Montauk Point, from Montauk Point to the capes of Delaware, and from the South Cape of Florida to the Mississippi. (Comm. I. \*\*29, 30.)

Woolsey declared that such a claim would be "out of character for a nation that has ever asserted the freedom of doubtful waters, as well as contrary to the spirit of more recent times." (Int. Law, § 60.)

See, also, Martens, Précis, I. 336; Bluntschli, § 302; Heffter, § 75; Klüber, § 130; Ortolan, I. 153; Schlaltarella, Del Territoris, 8; Henry, Adm. Jurisdiction, § 89; Twiss, Oregon Territory, 111, citing Vattel, Book 1, § 205; Com. v. Manchester, 152 Mass. 230, 139 U. S. 240; In re Humboldt Lumber Mfrs.' Assoc., 60 Fed. Rep. 428; Montgomery v. Henry (1780), 1 Dallas, 49.

The coastal waters, harbors, and other navigable waters of the island of Porto Rico, are waters of the United States within the meaning of sec. 10 of the river and harbor act of 1899, 30 Stat. 1151, prohibiting unauthorized obstructions to navigation in any of the waters of the United States and vesting in the Secretary of War a certain control of wharves and similar structures in ports and other waters of the United States.

Knox, At.-Gen., Oct. 17, 1901, 23 Op. 551, 555.

The rule of territorial waters is inapplicable to ships on the high seas; hence a ship can not draw around her and appropriate so much of the ocean as she may deem necessary for her protection, and prevent any nearer approach.

The Marianna Flora, 11 Wheat. 1.

It is laid down that foreign ships have a right of innocent passage through the marginal sea.

Hall, Int. Law (4th ed.), 212; Rivier, Principes du Droit des Gens, I. 152. As to what constitute the coastal waters of the United States, in the sense of the rules of navigation, see the Delaware (1896), 161 U. S. 459.

As to maritime ceremonial, see Calvo, I. §§ 296-345; Heffter, § 194-197; Klüber, Droit des Gens Moderne de l'Europe, § 89-122.

The United States, in 1897, while complaining of the action of the captain of the Spanish cruiser *Reina Mercedes*, in firing upon the American steamer *Valencia*, near Guantanamo, Cuba, in order to make her show her flag, said: "I am prepared to admit, in all frankness, that during the continuance of a civil war such as is now flagrant in the island of Cuba, it would be extremely convenient, and perhaps a prudent precaution, for American ships legitimately resorting to Cuban waters to show their flag when sighting a Spanish cruiser within the 3-mile limit, even if a formal salute be not called for by the ordinary code of maritime ceremonial;" and it was stated that advice to this effect would be given. (Mr. Sherman, Sec. of State, to Mr. Dupuy de Lôme, Span. min., June 21, 1897, For. Rel. 1897, 505.)

As to the case of the *Alhiança*, see For. Rel. 1895, II. 1177-1185; and the annual message of President Cleveland of Dec. 2, 1895, For. Rel. 1895, I. xxxiii.

In a series of resolutions adopted by the Institut de Droit International, at Paris, in 1894, it was laid down (art. 5) that all ships without distinction have the right of innocent passage through the territorial sea, subject to the right of belligerents to regulate and for purposes of defense even to bar such passage, and subject also to the right of neutrals to regulate the passage of ships of war of all nationalities.

As to jurisdiction over passing vessels, the following resolutions were adopted:

“ART. 6. Crimes and offences, committed on foreign ships passing through territorial waters by persons on board such ships against persons or things also on board, are, as such, outside the jurisdiction of the bordering state, unless they involve a violation of the rights or interests of the bordering state, or of its inhabitants who are neither members of the crew or passengers.

“ART. 7. Ships traversing territorial waters must conform to special regulations of the bordering state in the interest or for the security of navigation and maritime police.

“ART. 8. Ships of all nationalities, by the fact of being in territorial waters, unless only passing through, are subject to the jurisdiction of the bordering state.

“The bordering state may continue on the high seas a pursuit begun in territorial waters, to arrest and try a ship which has committed a violation of law within the limits of those waters. In case of capture on the high seas, the fact shall be made known without delay to the state whose flag she bears. The pursuit is interrupted the moment the ship enters the territorial waters of her own or of a third country. The right of pursuit ceases when the vessel enters a port of her own or of a third power.

“ART. 9. The particular situation of ships of war and of those assimilated to them is reserved.”

Institut de Droit International, *Annuaire* (1894-95), XIII. 329.

By the common law, title to the soil under tide waters, below high-water mark, unless private rights in it have been acquired by grant or prescription, is in the king, subject to the public rights of navigation and fishing. Upon the American revolution, the title to and dominion over tide waters and the lands under them vested in the several States, though certain rights were afterwards surrendered by the Constitution to the United States. The United States, on acquiring territory, whether by cession from one of the States or by treaty with a foreign country, or by discovery and settlement, takes the title and the dominion of lands below high-water mark for the benefit of the whole people, and in trust for the future States to be created out of the territory; although, while holding the country as

territory, it possesses all the powers both of national and municipal government, and may grant, for appropriate purposes, titles to or rights in the soil below high-water mark. Congress, however, has not undertaken by general laws to dispose of such lands in the territories, but, unless in case of some international duty or public exigency, has left such waters and lands to the control of the States, respectively, when admitted into the Union. Hence it was held that a donation land claim, bounded by the Columbia River, acquired under the act of Congress of Sept. 27, 1850, c. 76, while Oregon was a Territory, passed no title to lands below high-water mark, as against a subsequent grant from the State of Oregon, pursuant to its statutes.

*Silvily v. Bowlby* (1894), 152 U. S. 1. See also *Hardin v. Jordan* (1891), 140 U. S. 371; *Mitchell v. Smale* (1891), *id.* 406; *Baer v. Moran Brothers Co.* (1894), 153 U. S. 287; *Lowndes v. Huntington* (1894), 153 U. S. 1; *St. Louis v. Rutz* (1891), 138 U. S. 226, 250.

## (2) POSITION OF THE UNITED STATES.

### § 145.

“The President of the United States, thinking that, before it shall be finally decided to what distance from our seashores the territorial protection of the United States shall be exercised, it will be proper to enter into friendly conferences and explanations with the powers chiefly interested in the navigation of the seas on our coasts, and relying that convenient occasions may be taken for these hereafter, finds it necessary in the meantime to fix provisionally on some distance for the present government of these questions. You are sensible that very different opinions and claims have been heretofore advanced on this subject. The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upwards of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, *is the utmost range of a cannon ball*, usually stated at one sea league. Some intermediate distances have also been insisted on, and that of three sea leagues has some authority in its favor. The character of our coast, remarkable in considerable parts of it for admitting no vessels of size to pass near the shores, would entitle us, in reason, to as broad a margin of protected navigation as any nation whatever. Reserving, however, the ultimate extent of this for future deliberation, the President gives instructions to the officers acting under his authority to consider those heretofore given them as restrained for the present to the distance of one sea league or three geographical miles from the seashores. This distance can admit of no opposition, as it is recognized by treaties between some of the

powers with whom we are connected in commerce and navigation, and is as little, or less, than is claimed by any of them on their own coasts.

“For the jurisdiction of the rivers and bays of the United States, the laws of the several States are understood to have made provision, and they are, moreover, as being landlocked, within the body of the United States.”

Mr. Jefferson, Sec. of State, to Mr. Hammond, Brit. min., Nov. 8, 1793, Brit. Counter Case and Papers, Geneva Arbitration, American reprint, 353.

A similar note was sent on the same day to M. Genet, the French min. ister. (Am. State Papers, For. Rel. I. 183; Walt's Am. State Papers, I. 195.)

Corresponding instructions were given to the district attorneys, Nov. 10, 1793. (MS. Dom. Let.)

See, also, circular of Mr. Hamilton, Secretary of the Treasury, to collectors of customs, Feb. 10, 1794, Brit. Counter Case and Papers, Geneva Arbitration, Am. reprint, 508.

“The President [Mr. Jefferson, in an informal conversation] mentioned a late act of hostility committed by a French privateer near Charleston, S. C., and said we ought to assume, as a principle, that the neutrality of our territory should extend to the Gulf Stream, which was a natural boundary, and within which we ought not to suffer any hostility to be committed. Mr. Gaillard observed that on a former occasion in Mr. Jefferson's correspondence with Genet, and by an act of Congress at that period, we had seemed only to claim the usual distance of three miles from the coast; but the President replied that he had then assumed that principle because Genet, by his intemperance, forced us to fix on some point, and we were not then prepared to assert the claim of jurisdiction to the extent we are in reason entitled to; but he had taken care to reserve this subject for further consideration with a view to this same doctrine for which he now contends.”

Memoirs of J. Q. Adams, I. 375-376.

“As to the jurisdiction exercised by the United States over the sea contiguous to its shores, all nations claim and exercise such a jurisdiction, and all writers admit this claim to be well founded; and they have differed in opinion only as to the distance to which it may extend. Let us see whether France has claimed a greater or less extent of dominion over the sea than the United States. Valin, the King's advocate at Rochelle, in his new Commentary on the Marine Laws of France, published first in 1761, and again by approbation in 1776, (Book V., title 1,) after mentioning the opinions of many different writers on public law on this subject, says: ‘As far as the distance of two leagues the sea is the dominion of the sovereign of the neighboring coast; and

that whether there be soundings there or not. It is proper to observe this method in favor of states whose coasts are so high that there are no soundings close to the shore, but this does not prevent the extension of the dominion of the sea, *as well in respect to jurisdiction as to fisheries*, to a greater distance by particular treaties, or the rule hereinbefore mentioned, which extends dominion as far as there are soundings, or as far as the reach of a cannon shot; *which is the rule at present universally acknowledged.* 'The effect of this dominion,' the same author says, 'according to the principles of Puffendorf, which are incontestable, is, that every sovereign has a right to protect foreign commerce, in his dominions, as well as to secure it from insult, by preventing others from approaching nearer than a certain distance.' In extending our dominion over the sea to one league, we have not extended it so far as the example of France and the other powers of Europe would have justified. They, therefore, can have no right to complain of our conduct in this respect."

Hamilton, in "The Answer," Hamilton's Works, Lodge's ed., VI. 218.

"Our jurisdiction . . . has been fixed (at least for the purpose of regulating the conduct of the government in regard to any events arising out of the present European war) to extend three geographical miles (or nearly three and a half English miles) from our shores; with the exception of any waters or bays which are so landlocked as to be unquestionably within the jurisdiction of the United States, be their extent what they may."

Mr. Pickering, Sec. of State, to the Lieut. Governor of Virginia, Sept. 2, 1796, 9 MS. Dom. Let. 281.

This letter related to a complaint of the master of the American ship *Eliza* that he had been captured by the British frigate *Thetis* within the territorial waters of the United States. The distance of the capture from land being, however, indefinitely alleged, Mr. Pickering took the ground that the Government could not "authoritatively interfere" without further evidence on the question, but that the most that could be done under the circumstances was to exhibit the papers to the British minister, who had undertaken to address the commander of the *Thetis* in a cautionary sense.

"There could surely be no pretext for allowing less than a marine league from the shore, that being the narrowest allowance found in any authorities on the law of nations. If any nation can fairly claim a greater extent the United States have pleas which cannot be rejected; and if any nation is more particularly bound by its own example not to contest our claim, Great Britain must be so by the extent of her own claims to jurisdiction on the seas which surround her. It is hoped, at least, that within the extent of one league you will be able to obtain an effectual prohibition of British ships of war from repeating the irreg-



ularities which have so much vexed our commerce and provoked the public resentment, and against which an article in your instructions emphatically provides. It cannot be too earnestly pressed on the British Government that in applying the remedy copied from regulations heretofore enforced against a violation of the neutral rights of British harbors and coasts, nothing more will be done than what is essential to the preservation of harmony between the two nations. In no case is the temptation or the facility greater to ships of war for annoying our commerce than in their hovering on our coasts and about our harbors; nor is the national sensibility in any case more justly or more highly excited than by such insults. The communications lately made to Mr. Monroe, with respect to the conduct of British commanders even within our own waters, will strengthen the claim for such an arrangement on this subject, and for such new orders from the British Government as will be a satisfactory security against future causes of complaint."

Mr. Madison, Sec. of State, to Messrs. Monroe and Pinkney, ministers to England, Feb. 3, 1807, *Am. State Papers, For. Rel.* III. 153, 155.

"The exclusive jurisdiction of a nation extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of sea inclosed by headlands; and, also, to the distance of a marine league, or as far as a cannon-shot will reach from the shore along all its coasts." Within these limits the sovereign of the mainland may arrest, by due process of law, alleged offenders on board of foreign merchant ships.

Mr. Buchanan, Sec. of State, to Mr. Jordan, Jan. 23, 1849, 37 *MS. Dom. Let.* 98. See, to the same effect, Gallatin's *Writings*, II. 186.

"This Government adheres to, recognizes, and insists upon the principle that the maritime jurisdiction of any nation covers a full marine league from its coast, and that acts of hostility or of authority within a marine league of any foreign country by naval officers of the United States are strictly prohibited, and will bring upon such officer the displeasure of this Government."

Mr. Seward, Sec. of State, to Mr. Welles, Sec. of the Navy, Aug. 4, 1862, 58 *MS. Dom. Let.* 15.

See, further, Mr. Seward to Mr. Welles, Oct. 10, 1862, 58 *MS. Dom. Let.* 324.

"There was reason to hope that the practice which formerly prevailed with powerful nations of regarding seas and bays usually of large extent near their coast as closed to any foreign commerce or fishery not specially licensed by them, was, without exception, a pretension of the past, and that no nation would claim exemption from the general rule of public law which limits its maritime jurisdiction

to a marine league from its coast. We should particularly regret if Russia should insist on any such pretension."

Mr. Fish, Sec. of State, to Mr. Boker, min. to Russia, Dec. 1, 1875, MS. Inst. Russia, XV. 536.

(3) DISCUSSION AS TO CUBA.

§ 146.

"The undersigned, Secretary of State of the United States, having taken the instructions of the President, will perform the duty of answering the note which was addressed to the undersigned on the 8th of October by His Excellency Señor Gabriel G. Tassara, minister plenipotentiary of Her Catholic Majesty the Queen of Spain.

"In that paper Mr. Tassara informs the undersigned that Her Catholic Majesty's Government is surprised that a United States naval officer cruising in the waters of Cuba has fallen into the error of claiming that the jurisdictional belt of the island of Cuba does not extend beyond three miles, whereas the Government has fixed the limit at six miles on the open sea. Mr. Tassara proceeds under his instructions to say that in fixing that limit Her Catholic Majesty's Government has conformed to all the rules of the law of nations. Mr. Tassara next observes that the principle which is generally recognized is that maritime jurisdiction extends to the range of a cannon ball, and that even abiding by this principle, which every nation has modified at its will, the belt fixed by Spain goes no farther than the modern improvements in artillery. Mr. Tassara, pursuing the subject, remarks that no international compact is required for the determination or recognition of a jurisdiction which is not at all excessive, but a special treaty might be necessary for making an exception in favor of any nation and no such treaty exists between Spain and the United States. Mr. Tassara adds that the United States are so much the more obliged to respect this principle as he thinks it must be evident to the undersigned that the jurisdictional belt claimed by the United States in some cases extends many miles farther than that designated by Spain.

"Mr. Tassara concludes with informing the undersigned that Her Catholic Majesty's Government trusts that the United States will cause the commanding officers of their naval forces in the Gulf to understand that the jurisdictional belt of the island of Cuba extends to six miles on the open sea, and that only beyond that limit is it allowed to them to exercise any act which may be in opposition to the rights of Spanish authority, and that thus all misunderstanding will cease, and the good relations of the two countries will not be liable to be disturbed by causes which ought entirely to disappear.

"The undersigned would observe, in the first place, that there are two principles bearing on the subject which are universally admitted, namely, first, that the sea is open to all nations, and secondly, that there is a portion of the sea adjacent to every nation over which the sovereignty of that nation extends to the exclusion of every other political authority.

"A third principle bearing on the subject is also well established, namely, that this exclusive sovereignty of a nation, thus abridging the universal liberty of the seas, extends no farther than the power of the nation to maintain it by force, stationed on the coast, extends. This principle is tersely expressed in the maxim *Terræ dominium finitur ubi finitur armorum vis*.

"But it must always be a matter of uncertainty and dispute at what point the force of arms exerted on the coast can actually reach. The publicists rather advanced towards than reached a solution when they laid down the rule that the limit of the force is the range of a cannon-ball. The range of a cannon-ball is shorter or longer according to the circumstances of projection, and it must be always liable to change with the improvements of the science of ordnance. Such uncertainty upon a point of jurisdiction or sovereignty would be productive of many and endless controversies and conflicts. A more practical limit of national jurisdiction upon the seas was indispensably necessary, and this was found, as the undersigned thinks, in fixing the limit at three miles from the coast. This limit was early proposed by the publicists of all maritime nations. While it is not insisted that all nations have accepted or acquiesced and bound themselves to abide by this rule when applied to themselves, yet three points involved in the subject are insisted upon by the United States: First, that this limit has been generally recognized by nations; second, that no other general rule has been accepted; and third, that if any state has succeeded in fixing for itself a larger limit, this has been done by the exercise of maritime power, and constitutes an exception to the general understanding which fixes the range of a cannon-shot (when it is made the test of jurisdiction) at three miles. So generally is this rule accepted that writers commonly use the two expressions, of a range of cannon-shot and three miles, as equivalents of each other. In other cases they use the latter expression as a substitute for the former. Thus Wildman, in his 'Plain directions to naval officers as to the law of search, capture, and prize' (page 12, ed. London, 1854), says: 'The capture of vessels within the territory of a neutral state, or within three miles of the coast, . . . is illegal with respect to the neutral sovereign.'

"Impressed by these general views, the United States are not prepared to admit that Spain, without a formal concurrence of other

nations, can exercise exclusive sovereignty upon the open sea beyond a line of three miles from the coast, so as to deprive them of the rights common to all nations upon the open sea.

"The United States admit that they have a temporary interest (during the present insurrection) to maintain a broad freedom of the seas, so as to render their naval operations as effective as may be consistent with the law of nations.

"The United States admit, moreover, that they favor the principle of enlarging the liberty of the seas, in their general policy, now as heretofore. But they declare, at the same time, that they entertain no jealousy of Spain. It need not be said anew that they have no hostile designs against her, and that they have no policy which is inconsistent with her retention of the island of Cuba, and her maintenance of her authority in that important part of her colonial dominions. They have, therefore, not been hasty in adopting the conclusion which the undersigned has announced upon the question which has thus been presented to them by Her Catholic Majesty's Government.

"They have even taken the pains to recur to the correspondence which has heretofore passed between the two countries to obtain such light upon the subject as might be derived from that source.

"Spain presented substantially the same claim to this Government in the case of the *El Dorado* in 1856, and Mr. William L. Marcy, then Secretary of State, by direction of the President, announced that the United States could not concede the extension of Spanish sovereignty beyond three miles in the seas which surround the island of Cuba.

"Upon the grounds which have been set forth, the President feels himself obliged to decline to give to the naval commanders of the United States the instructions proposed to him by Her Catholic Majesty's Government.

"In concluding, the undersigned thinks it is not unimportant to explain to Mr. Tassara the delay which has attended this reply. When Mr. Tassara's note was received, the undersigned could not close his eyes against the fact that the question presented by Mr. Tassara, although one of confessed importance, had not yet actively arisen in any proceedings or transactions which had occurred between the authorities of the two countries, and that therefore it was in one sense a speculative one. The undersigned, nevertheless, proposed to himself to enter upon the subject in a spirit of entire frankness and cordiality. At that moment, however, the case of the destruction of the so-called steamer *Blanche* or *General Rush*, by the United States war steamer *Montgomery*, as was alleged within the waters of Cuba, was brought to the knowledge of this Government by Mr. Tassara.

With the imperfect information concerning that subject which this Government has until recently had, it seemed probable that it might not only appear but might even be a material point in that case that the so-called *Blanche* was fired upon by the *Montgomery* more than three miles from and within six miles of the coast of Cuba. It seemed probable to the undersigned that, in that case, he would be obliged to examine in direct connection with the case of the so-called *Blanche*, the claim of Spain to a jurisdiction outside of three statute miles in the waters which surround the island of Cuba, and so that instead of a speculative one the question would have become inevitably a practical one. It now appears that the injuries complained of by Spain, so far as they have been entertained in the case of the so-called *Blanche*, were committed on the very shore of the island of Cuba, and within the universally conceded and unquestioned jurisdiction of Spain. The reason for the delay of this note has thus passed away."

Mr. Seward, Sec. of State, to Mr. Tassara, Span. min. Dec. 16, 1862;  
MS. Notes to Spain, VII. 331.

See Mr. Seward, Sec. of State, to Mr. Welles, Sec. of Navy, Oct. 10, 1862;  
58 MS. Dom. Let. 324.

"The undersigned, Secretary of State of the United States, has the honor to recur to the subject of the claim of the Government of Her Catholic Majesty to a maritime jurisdiction of six miles, in the waters which surround the island of Cuba. The most deliberate and respectful consideration has been bestowed upon the arguments in support of that claim which have been submitted to him by Señor Gabriel G. Tassara, Her Catholic Majesty's minister plenipotentiary near the United States.

"There seems to be an entire agreement between Mr. Tassara and the undersigned upon the proposition that Spain has an undoubted jurisdiction to some extent over the sea adjacent to the island of Cuba. It is upon the line of this exclusive maritime jurisdiction that the question which is to be considered arises. The undersigned has maintained as a general principle, announced by publicists and accepted by maritime powers, that the jurisdiction of maritime nations extends three miles over the seas to their coasts.

"Mr. Tassara is not understood to deny this proposition. But he insists that this principle has its exceptions, and that some states, and among them the United States, habitually claim and exercise a wider jurisdiction. While this fact is cheerfully admitted, it does not seem to the undersigned conclusive in favor of the claim of Spain. The exceptions are so few and so special that they do not disturb or impair the general principle that three miles is the legal boundary of external maritime jurisdiction. Mr. Tassara seems to assume, however, that as there are some existing and acknowledged

exceptions to that principle, so there are also other existing exceptions which ought to be acknowledged, and that the jurisdiction for which he is now contending is such an exception. He very truly assumes that wherever such an exception actually exists, evidence of it will be found in the statutes or decrees of the maritime power which asserts it. As such evidence, he quotes several royal decrees of Spain, some ancient and others modern, which declare that the jurisdiction of Spain in the waters which surround her coasts extends to the limit of six miles.

“Nevertheless it cannot be admitted, nor indeed is Mr. Tassara understood to claim, that the mere assertion of a sovereign, by an act of legislation, however solemn, can have the effect to establish and fix its external maritime jurisdiction. His right to a jurisdiction of three miles is derived not from his own decree but from the law of nations, and exists even though he may never have proclaimed or asserted it by any decree or declaration whatsoever. He cannot, by a mere decree, extend the limit and fix it at six miles, because, if he could, he could in the same manner, and upon motives of interest, ambition, or even upon caprice, fix it at ten, or twenty, or fifty miles, without the consent or acquiescence of other powers which have a common right with himself in the freedom of all the oceans. Such a pretension could never be successfully or rightfully maintained. The statutes which Mr. Tassara has recited are therefore regarded as showing what certainly is by no means unimportant, that Spain at an early day asserted, and has on different occasions since that time reasserted, in her domestic legislation, a claim to an exceptional jurisdiction of three miles in addition to the three miles of jurisdiction conceded by the law of nations.

“A claim thus asserted and urged must necessarily be now respected and conceded by the United States, if it could be shown that on its being brought to their notice they had acquiesced in it, or that on its being brought to the notice of other powers it had been so widely conceded by them as to imply a general recognition of it by the maritime powers of the world. It is just here, however, that the claim of Spain seems to need support. Nations do not equally study each other's statute books, and are not chargeable with notice of national pretensions resting upon foreign legislation. The undersigned cannot admit that this claim of Spain to a maritime jurisdiction of six miles was recognized or admitted by the United States in the treaty of friendship, amity, and commerce between the United States and Spain which was celebrated in 1795, insomuch as there is no evidence that this peculiar and exceptional claim of maritime jurisdiction was then brought by the one party to the knowledge of the other. The case of the *El Dorado* seems to be the only one in which this claim of

Spain has been brought to the notice of this Government. In regard to that case, all that Mr. Tassara is understood to insist upon is that the Spanish Government did not renounce the claim, nor renew it, while it is not denied that this Government declined to concede it.

“Within the period which has elapsed since the date of the first royal decree asserting the claim to which Mr. Tassara has directed the attention of the undersigned, there have been many and long periods of naval war, but the undersigned has not been given to understand that any maritime power having been made actually acquainted with the claim of Spain to a jurisdiction of six miles around the island of Cuba has acquiesced therein, or recognized the same.

“It results from these remarks, that while it is admitted that on the part of Spain the claim is not one of new creation, it is practically one that has only recently been presented to the United States, and for aught that appears is entirely new to other maritime powers.

“The undersigned is far from intimating that these facts furnish conclusive reasons for denying the claim a respectful consideration. On the contrary, he very cheerfully proceeds to consider a farther argument, derived, as Mr. Tassara supposes, from reason and justice, which he has urged in respect to the claim. This ground is, that the shore of Cuba is, by reason of its islets and smaller rocks, such as to require that the maritime jurisdiction of Cuba, in order to purposes of effective defense and police, should be extended to the breadth of six miles. The undersigned has examined what are supposed to be accurate charts of the coast of Cuba, and if he is not misled by some error of the chart, or of the process of examination, he has ascertained that nearly half of the coast of Cuba is practically free from reefs, rocks, and keys, and that the seas adjacent to that part of the island which includes the great harbors of Cabanos, Havana, Matanzas, and Santiago are very deep, while in fact the greatest depth of the passage between Cuba and Florida is found within five miles of the coast of Cuba, off the harbor of Havana.

“The undersigned has further ascertained, as he thinks, that the line of keys which confront other portions of the Cuban coast resemble, in dimensions, constitution and vicinity to the mainland, the keys which lie off the southern Florida coast of the United States. The undersigned assumes that this line of keys is properly to be regarded as the exterior coast line, and that the inland jurisdiction ceases there, while the maritime jurisdiction of Spain begins from the exterior sea front of those keys.

“In view of the considerations and facts which have been thus presented, the undersigned is obliged to state that the Government of the United States is not prepared to admit that the jurisdiction of

Spain in the waters which surround the island of Cuba lawfully and rightly extends beyond the customary limit of three miles."

Mr. Seward, Sec. of State, to Mr. Tassara, Spanish min., Aug. 10, 1863, MS. Notes to Span. Leg. VII. 407.

See letter of Mr. Bache, superintendent of the Coast Survey, to Mr. Seward, April 10, 1863, MS. Misc. Let., answering in the negative the inquiry made by Mr. Seward, January 18, 1863, whether the "configuration of the Cuban seas required, as was maintained, an extension of the 3-mile line."

In a note of August 9, 1863, which was received after the foregoing communication was prepared, Mr. Tassara notified Mr. Seward that the Spanish Government had determined to insist upon its claim by naval force after the ensuing October. Mr. Seward at once replied that the United States, under the circumstances then existing, could not concede the claim with a due regard to its necessities, its rights, or its national self-respect. He stated, however, that the United States would agree to refer the claim to the examination of all the great maritime states: but that, as such a reference would be dilatory if not impracticable, the President was willing, subject to the constitutional consent of the Senate, to refer the question to any of those powers, whether Great Britain, France, Belgium, the Netherlands, Russia, Prussia, the Hanse Towns, Denmark, or Italy. Or, if Spain should prefer it, the United States would appoint one or more delegates to confer with an equal number appointed by Spain; and these delegates might, in case of disagreement, choose an umpire, the decision of all the delegates or of the umpire to be final.

Mr. Seward, Sec. of State, to Mr. Tassara, Span. min., Aug. 10, 1863, MS. Notes to Span. Leg. VII. 413.

See, also, Mr. Seward to Mr. Tassara, Sept. 2, 1863, *id.* 421.

"The new phase of affairs in Mexico creates much solicitude, nor must we overlook the strange attitude which the Spanish Government has assumed in regard to the claim of maritime jurisdiction in Cuba. In consideration of these facts this Government is pressing its preparations for naval defence with all possible energy." (Mr. Seward, Sec. of State, to Mr. Adams, minister to England, Sept. 2, 1863, MS. Inst. to Great Britain, XVIII. 589.)

See also, Mr. Seward, Sec. of State, to Mr. Welles, Sec. of Navy, July 6, 1863, 61 MS. Dom. Let. 162. •

The terms of a convention were afterwards agreed on for the submission of the correspondence to the King of the Belgians, in order that he might, as arbitrator, determine the question whether the maritime jurisdiction of Her Catholic Majesty in the waters surrounding the waters of Cuba "extends only three miles, or whether it extends six miles from the line of the coast or of the islets thereabouts."



Mr. Seward, Sec. of State, to Mr. Tassara, Span. min., Oct. 9, 1863, MS. Notes to Span. Leg. VII. 429; Mr. Tassara to Mr. Seward, Dec. 9, 1863, MS. Notes from Spain; Mr. Seward to Mr. Tassara, Dec. 14, and Dec. 17, 1863, MS. Notes to Span. Leg. VII. 443, 444.

The question never was submitted.

The Spanish claim of jurisdiction may have been acted on by the commander of a Spanish man-of-war in seizing the American steamer *Colonel Lloyd Aspinwall*, Jan. 21, 1870, from four to six miles, as was alleged, off Nuevitás, in Cuba. The United States demanded the release of the vessel on the ground (1) that she was seized on the high seas, and (2) that she was engaged in bearing official dispatches for the Government. The Spanish Government replied that "the officers who made the capture asserted that it was made, not on the high seas, but within the maritime jurisdiction of Spain," but ordered the vessel to be released on the ground of her employment as a bearer of official dispatches for the United States. (Moore, Int. Arbitrations, II. 1007, 1008, 1010, 1011.)

"The maritime jurisdiction of Spain may be acknowledged to extend not only to a marine league beyond the coast of Cuba itself, but also to the same distance from the coast line of the several islets or keys with which Cuba itself is surrounded. Any acts of Spanish authority within that line can not be called into question, provided they shall not be at variance with law or treaties."

Mr. Fish, Sec. of State, to Mr. Borie, Sec. of the Navy, May 18, 1869, 81 MS. Dom. Let. 124.

"The instruction from the foreign office to Mr. Watson, of the 25th of September last, a copy of which was communicated by that gentleman to this Department, in his note of the 17th of October, directs him to ascertain the views of this Government in regard to the extent of maritime jurisdiction which can properly be claimed by any power, and whether we have ever recognized the claim of Spain to a six-mile limit or have ever protested against such claim.

"In reply I have the honor to inform you that this Government has uniformly, under every administration which has had occasion to consider the subject, objected to the pretension of Spain adverted to, upon the same ground and in similar terms to those contained in the instruction of the Earl of Derby."

Mr. Fish, Sec. of State, to Sir Edward Thornton, Brit. min., Jan. 22, 1875, For. Rel. 1875, I. 649.

In 1880-81 a discussion took place between the United States and Spain in relation to the visitation and firing upon of the American vessels *Ethel A. Merritt*, *Eunice P. Newcomb*, *George Washington*, and *Hattie Haskell* by Spanish gunboats near the island of Cuba, in May, June, and July, 1880. There was a wide variance between the statements of the officers of the vessels and statements of the officers of

the gunboats as to the distance from shore at which the acts in question took place. But, although the facts were thus in dispute, the United States said: "This Government must adhere to the three-mile rule as the jurisdictional limit.

Mr. Evarts, Sec. of State, to Mr. Fairchild, mln. to Spain, No. 111, March 3, 1881, For. Rel. 1881, 1051.

The acts of Congress authorizing the Secretary of War to remove sunken vessels which obstruct the navigable rivers of the United States do not apply to the coastal waters of Cuba, since such waters did not become waters of the United States by reason of the temporary jurisdiction of the latter over the island.

Griggs, At-Gen., March 29, 1900, 23 Op. 76.

(4) BRITISH ACT, 1878.

§ 147.

The Court of Queen's Bench having held, in the case of *Queen v. Keyn*, L. R. 2 Excheq. Div. 63 (Nov. 11 and 13, 1876), commonly called the case of the *Franconia*, that the central criminal court, as the possessor of the jurisdiction formerly exercised by the admiral over criminal offences, had no jurisdiction over an offence committed by a foreigner on a foreign ship within three miles of the British coast, since the admiral had, as was contended, no jurisdiction of offences by foreigners on foreign ships either within or without that limit, Parliament passed, August 16, 1878, the territorial waters jurisdiction act, 1878, declaring:

"Whereas the rightful jurisdiction of Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions;

"And whereas it is expedient that all offences committed on the open sea within a certain distance of the coasts of the United Kingdom and all other parts of Her Majesty's dominions, by whomsoever committed, should be dealt with according to law:

*"Be it therefore enacted, &c.: . . .*

"2. An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly."

By section 3 it is provided that the offender, if he is not a subject of Her Majesty, shall not be prosecuted unless one of the principal

secretaries of state, or, in the case of a colony, the governor, shall certify that the institution of proceedings is in his opinion expedient.

"5. Nothing in this act contained shall be construed to be in derogation of any rightful jurisdiction of Her Majesty, her heirs or successors, under the law of nations, or to affect or prejudice any jurisdiction conferred by act of Parliament or now by law existing in relation to foreign ships or in relation to persons on board such ships.

"6. This act shall not prejudice or affect the trial in manner heretofore in use of any act of piracy as defined by the law of nations, or affect or prejudice any law relating thereto; and where any act of piracy as defined by the law of nations is also any such offence as is declared by this act to be within the jurisdiction of the admiral, such offence may be tried in pursuance of this act, or in pursuance of any other act of Parliament, law, or custom relating thereto.

"7. . . . 'The territorial waters of Her Majesty's dominions,' in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by this act to be within the jurisdiction of the admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions."

The case of *Queen v. Keyn* is criticised in *Maine, Int. Law*, 38; *Walker, Science of Int. Law*, 173; *Stephen's Hist. of the Criminal Law*, II. 29-42; the Case of the "*Franconia*," by Dwight Foster, *Am. Law Rev.* XI. 625 (July, 1877); *Twiss, Case of the Franconia, Law Mag. & Rev.* II. 145 (Feb., 1877); *Com. v. Macloon*, 101 *Mass.* 1; *Hall, Int. Law* (4th ed.), 213, note.

(5) CASE OF THE COSTA RICA PACKET.

§ 148.

January 24, 1888, an Australian whaling ship, the *Costa Rica Packet*, sighted at sea a water-logged derelict prauw (native Malayan boat) of about a ton burden. Two boats were put off, which, finding goods on board the prauw, towed it alongside the ship, where there were transferred to her deck from the prauw ten cases of gin, three cases of brandy, and a can of kerosene, the brandy and gin being more or less damaged by sea water. The prauw and its contents belonged to some natives of the Dutch East Indies; and three years afterwards, the *Costa Rica Packet* being then in the port of Ternate, Dutch East Indies, the master was arrested on a charge of theft, in having seized the prauw and maliciously appropriated the goods on it. A claim

was made against the Dutch Government for his arrest and imprisonment, on the ground that the act complained of took place on the high seas outside Dutch jurisdiction. The warrant of arrest alleged that it took place not more than three miles from land, but the evidence showed that it was at least fifteen or twenty. The case was referred to Dr. von Martens, of St. Petersburg, as arbitrator, who awarded damages to the British Government, holding that "the prauw, floating derelict at sea, . . . was seized incontrovertibly outside the territorial waters of the Dutch Indies." In the course of his award he observed that "the right of sovereignty of the state over territorial waters is determined by the range of cannon measured from the low-water mark." On the facts proved, however, the question of the three-mile limit was not involved in the decision, the distance of the prauw from the shore having far exceeded the range of cannon shot.

Moore, Int. Arbitrations, V. 4948, 4952, 4953.

(6) RULE AS TO FISHERIES.

§ 149.

No general disposition has been manifested in recent years to restrict the right of all nations to take fish in the open sea. The three-mile rule, which defines the exclusive right of fishery on the Canadian coasts under the convention between the United States and Great Britain of 1818, may also be found in the convention of 1882 between Belgium, Denmark, France, Germany, and Great Britain for the regulation of the fisheries in the North Sea. The same rule is embodied in conventions between France and Great Britain of 1839 and 1843 for the regulation of the fisheries in the channel. It is also found in a law passed by the French legislature in 1885 for the exclusion of foreigners from fishing in the territorial waters of France and Algiers. In the British-French conventions of 1839 and 1843, and the North Sea convention of 1882,<sup>a</sup> the width of ten miles at the mouth is, with certain exceptions, adopted as the definition of bays, which are, for the purposes of the conventions, to be treated as territorial waters. This rule was also adopted, with certain specified exceptions, in the unratified treaty between the United States and Great Britain, concluded at Washington February 15, 1888, in relation to the fisheries adjacent to the eastern coasts of British North America. The reason of this definition in fisheries conventions is a practical one. The waters on either side of the bay

<sup>a</sup> For reports of the British delegates attending the international conferences at Stockholm, Christiania, and Copenhagen with respect to the fishery and hydrographical investigations in the North Sea, see Blue Book, North Sea Fishery Investigations, 1903.

within three marine miles of the shore being admittedly territorial, it is assumed that fishing in the intervening waters in bays less than ten miles wide at the mouth, if it were not actually unprofitable, would, by reason of the narrowness of the open space, be attended with constant risk of violating the law and with constant temptation to violate it.

“ The Department has recently received a despatch from Mr. Peirce, the minister of the United States at Honolulu, containing information upon the subject of the whaling interest in the Pacific. The despatch is accompanied by an extract from the *Hawaiian Gazette*, a copy of which is hereunto annexed. From this it appears that the British whaling barque *Faraway* has been warned not to engage in that pursuit in the Ochotsk Sea, and her master was served by a Russian war steamer with the notice which is at the foot of the newspaper extract. Although we are not aware that the notice has been served on any American whaling vessel, the generality of its terms makes such vessels under our flag liable to receive it, and as the interest of the United States in the business far exceeds that of any other country, it is important that we should be informed if the notice was issued by authority of the Russian Government. You will accordingly make the necessary inquiries upon this subject and will report the result.

“ There was reason to hope that the practice which formerly prevailed with powerful nations of regarding seas and bays usually of large extent near their coasts as closed to any foreign commerce or fishery not specially licensed by them was without exception a pretension of the past, and that no nation would claim exemption from the general rule of public law, which limits its maritime jurisdiction to a marine league from its coasts. We should particularly regret if Russia should insist on any such pretension.

“ In 1824 a convention was concluded between the United States and that power on the subject of fishing in the Pacific Ocean, by the first article of which it is stipulated that the citizens and subjects of the parties shall neither be disturbed nor restrained in following that pursuit. It is true that the IVth Article limits to ten years from the date of the instrument, the right to fish in interior seas, gulfs, harbors and creeks. It may be contended that by agreeing to this article we impliedly at least recognized the right of Russia to exclude our whalers from those interior seas and gulfs at the expiration of the ten years. This, however, cannot be acknowledged if such exclusion should operate in any interior seas of surface large enough to make much of that surface notoriously beyond the limit of maritime jurisdiction from the shores. The Ochotsk Sea at least is obviously of this character.”

Mr. Fish, Sec. of State, to Mr. Boker, min. to Russia, Dec. 1, 1875, MS Inst. Russia, XV. 536.

In reply to an inquiry whether American citizens were permitted by treaty stipulations to fish in the Sea of Okhotsk, and to go ashore to obtain bait and water, the Department of State replied that the conventional stipulations on the subject were contained in the treaty with Russia of 1824, and called attention to the correspondence with Russia published in For. Rel. 1882, 447-454. (Mr. Day, Assist. Sec. of State, to Mr. Loud, Oct. 12, 1897, 221 MS. Dom. Let. 443.)

For Mr. Cutts's report on the fisheries of the North Pacific, see S. Ex. Doc. 34, 42 Cong. 2 sess.

"Referring to previous correspondence between the Department and yourself on the subject of whale fishing off Bahia Bay, on the Brazilian coast, I have to acknowledge the receipt of your letter of the 8th instant on the same subject in which you express a desire to be informed whether such fishing on your part will contravene any existing treaty stipulations between the United States and Brazil.

"In reply, I have only to say that we have no existing treaty with Brazil, that of 1828 having expired in all its parts relating to navigation and commerce in 1841. The general law and rule is understood by this Government to be that beyond the marine league or three-mile limit, all persons may freely catch whale or fish. In computing this limit, however, 'bays' are not taken as a part of the high seas; the three miles must be outside of a line drawn from headland to headland."

Mr. John Davis, Assist. Sec. of State, to Mr. Osborn, Feb. 14, 1884, 150 MS. Dom. Let. 6.

In the MS. record-book the last words of the foregoing passage read, "from the headland to headline," but this appears to be a copyist's error.

"It being desirable that there should be an agreement between the several Departments of our Government as to the limits of territorial waters on our northeastern and northwestern coasts, I have the honor to submit to you the following statement of the law on this important question as held in the Department of State. What I have here to communicate bears, so far as concerns the Department over which you preside, on our own claim to a jurisdiction over territorial waters on the northwest coast beyond the three-mile zone. We resist this claim when advanced against us on the northeastern coast. What is now submitted to you is the question whether the principle thus asserted by us does not preclude us from setting up an extension, beyond this limit of our marine jurisdiction in the northwest.

"In a letter by Mr. Jefferson, when Secretary of State on November 8, 1793, to the minister of Great Britain, and in a circular of November 10, 1793, to the United States district attorneys, the limit of one sea-league from shore was provisionally adopted by him as

that of the territorial seas of the United States. The same position was taken by Mr. Pickering, Secretary of State, on September 2, 1796; by Mr. Madison, Secretary of State, Feby. 3, 1807; By Mr. Webster, Secretary of State, August 1, 1842; by Mr. Seward, Secretary of State, December 16, 1862, August 10, 1863, Sept. 16, 1864; and by Mr. Fish, Secretary of State, December 1, 1875.

"In a note from Mr. Fish to Sir Edward Thornton, dated Jan. 22, 1875, it is expressly stated in reply to inquiries from the British foreign office 'that this Government has uniformly, under every administration, objected to the pretension of Spain' to a six-mile limit. Mr. Fish proceeds to show that the United States statute, giving the right to board vessels within four leagues of the coast, is applied only to vessels coming to United States ports, and that the extension of the boundary line, between the United States and Mexico, to three leagues from land, by the treaty of Guadalupe Hidalgo, applies only to Mexico and the United States.

"Mr. Evarts, writing to Mr. Fairchild, then our representative in Spain on March 3, 1881 (Foreign Relations, 1881) said: 'This Government must adhere to the three-mile rule as the jurisdictional limit, and the cases of visitation *without that line* seem not to be excused or excusable under that rule.'

"Whether the line which bounds seaward the three-mile zone follows the indentations of the coast or extends from headland to headland is the question next to be discussed.

"The headland theory, as it is called, has been uniformly rejected by our Government, as will be seen from the opinions of the Secretaries above referred to. The following additional authorities may be cited on this point:

"President Woolsey makes the following comment on the 'headland' claim: 'But such broad claims have not, it is believed, been much urged, and they are out of character for a nation that has ever asserted the freedom of doubtful waters as well as contrary to the spirit of more recent times.'

"In an opinion of the umpire of the London commission of 1853, it was held that: 'It can not be asserted as a general rule, that nations have an exclusive right of fishery over all adjacent waters to a distance of three marine miles beyond an imaginary line drawn from headland to headland.'

"This doctrine is new and has received a proper limit in the convention between France and Great Britain of the 2d of August, 1839, in which it is equally agreed that the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland. Cited Halifax

Commission, page 152. In the same volume, page 155, it is stated that on May 14, 1870, the ten-mile-headland doctrine having been reasserted by Mr. Peter Mitchell, provincial minister of marine and fisheries, Lord Granville, British foreign secretary, on June 6, 1870, telegraphed to the governor-general as follows: 'Her Majesty's Government hopes that the United States fishermen will not be, for the present, prevented from fishing, except within three miles from land or in bays which are less than six miles broad at the mouth.'

"We may therefore regard it as settled that, so far as concerns the eastern coast of North America, the position of this Department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles from low-water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely, at a distance of three miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign.

"The position I here state, you must remember, was not taken by this Department speculatively. It was advanced in periods when the question of peace or war hung on the decision. When, during the three earlier administrations, we were threatened on our coast by Great Britain and France, war being imminent with Great Britain, and for a time actually though not formally engaged in with France, we asserted this line as determining the extent of our territorial waters. When we were involved, in the earlier part of Mr. Jefferson's Administration, in difficulties with Spain, we then told Spain that we conceded to her, so far as concerned Cuba, the same limit of territorial waters as we claimed for ourselves, granting nothing more; and this limit was afterwards reasserted by Mr. Seward during the late civil war, when there was every inducement on our part not only to oblige Spain, but to extend, for our own use as a belligerent, territorial privilege. When, in 1807, after the outrage on the *Chesapeake* by the *Leopard*, Mr. Jefferson issued a proclamation excluding British men-of-war from our territorial waters, there was the same rigor in limiting these waters to three miles from shore. And during our various fishery negotiations with Great Britain we have insisted that beyond the three-mile line British territorial waters on the north-eastern coast do not extend. Such was our position in 1783, in 1794, in 1815, in 1818. Such is our position now in our pending controversy with Great Britain on this important issue. It is true that there are qualifications to this rule, but these qualifications do not affect its application to the fisheries. We do not, in asserting this claim, deny



the free right of vessels of other nations to pass, on peaceful errands, through this zone, provided they do not by loitering produce uneasiness on the shore or raise a suspicion of smuggling. Nor do we hereby waive the right of the sovereign of the shore to require that armed vessels, whose projectiles, if used for practice or warfare, might strike the shore, should move beyond cannon range of the shore when engaged in artillery practice or in battle, as was insisted on by the French Government at the time of the fight between the *Kearsarge* and the *Alabama*, in 1864, off the harbor of Cherbourg. We claim also that the sovereign of the shore has the right, on the principle of self defence, to pursue and punish marauders on the sea to the very extent to which their guns would carry their shot, and that such sovereign has jurisdiction over crimes committed by them through such shot, although at the time of the shooting they were beyond three miles from shore. But these qualifications do not in any way affect the principle I now assert, and which I am asserting and pressing in our present contention with Great Britain as to the northeastern fisheries. From the time when European fishermen first visited the great fisheries of the northeastern Atlantic, these fisheries, subject to the territorial jurisdiction above stated, have been held open to all nations; and even over the marine belt of three miles the jurisdiction of the sovereign of the shore is qualified by those modifications which the law of necessity has wrought into international law. Fishing boats or other vessels, traversing those rough waters, have the right, not merely of free transit of which I have spoken, but of relief, when suffering from want of necessities, from the shore. There they may go by the law of nations, irrespective of treaty, when suffering from want of water, or of food or even of bait, when essential to the pursuit of a trade which is as precarious and as beset with disasters as it is beneficent to the population to whom it supplies a cheap and nutritious food. These rights we insist on being conceded to our fishermen in the northeast, where the mainland is under the British sceptre. We can not refuse them to others on our northwest coast, where the sceptre is held by the United States. We asserted them, as is seen by Mr. Fish's instruction, above quoted of December 1, 1875, against Russia, thus denying to her jurisdiction beyond three miles on her own marginal seas. We can not claim greater jurisdiction against other nations, of seas washing territories which we derived from Russia under the Alaska purchase."

Mr. Bayard, Sec. of State, to Mr. Manning, Sec. of Treasury, May 28, 1886, 160 MS. Dom. Let. 348.

As to hot pursuit, see *supra*, § 144.

In May, 1891, the Chilean insurgent steamer *Itata*, while in custody at San Diego, California, on a charge of violating the neutrality laws

of the United States, put to sea, taking with her a deputy United States marshal who was on board. Orders were given to United States men-of-war to search for her and seize her, if on the high sea. (Mr. Tracy, Sec. of Navy, to Capt. Remey U. S. S. Charleston, tel. May 8, 1891, H. Ex. Doc. 91, 52 Cong. 1 sess. 250.)

The *Itata* succeeded in reaching Iquique, where she was voluntarily delivered over to the United States by the Congressionalists without demand. (See testimony of Admiral Brown, in South Am. S. S. Co. v. United States, No. 18, United States and Chilean Claims Commission (1901), 218 et seq.)

In reply to an inquiry touching the halibut fisheries on the west coast of Greenland, the Danish minister at Washington communicated to the Department of State copies of a royal order of March 18, 1776, and of a decree of May 8, 1884, in relation to the Greenland trade and fisheries. By these papers, as well as by the minister's statement, it appeared that foreigners were at liberty to fish in the waters in question at a distance of a Danish mile from the coast.

Mr. Bayard, Sec. of State, to Count de Sponneck, Danish min., Dec. 3, 1888, acknowledging receipt of a note of Dec. 12; Mr. Bayard, Sec. of State, to Messrs. Babson, June 15, 1888, 168 MS. Dom. Let. 612.

That Norway claims, in respect of the fisheries, perhaps on grounds of prescription or long acquiescence, a jurisdiction of four marine miles, see Moore, Int. Arbitrations, I. 920, note.

By the act of April 30, 1900, to provide a government for the Territory of Hawaii, all laws of the Republic of Hawaii which conferred exclusive fishing rights on any person were repealed, and all sea fisheries of the Territory not included in any fish pond or artificial enclosure were declared to be free to all citizens of the United States, subject, however, to such vested rights as might be established in the manner prescribed in the act.

#### (7) QUESTION OF DEFENSIVE POWER.

#### § 150.

"In defining the distance protected against belligerent proceedings it would not, perhaps, be unreasonable, considering the extent of the United States, the shoalness of their coast, and the natural indication furnished by the well-defined path of the Gulf Stream, to expect an immunity for the space between that limit and the American shore. But at least it may be insisted that the extent of the neutral immunity should correspond with the claims maintained by Great Britain around her own territory. Without any particular inquiry into the extent of these, it may be observed, 1st, that the British act of Parliament in the year 1736, 9 G. II. c. 35, supposed to be that called the 'hovering act,' assumes, for certain purposes of trade, the distance

of four leagues from the shores; 2d, that it appears that, both in the reign of James I. and of Charles II. (see L. Jenkins, vols. 1 and 2) the security of the commerce with British ports was provided for by express prohibitions, against the roving or hovering of belligerent ships so near the neutral harbors and coasts of Great Britain as to disturb or threaten vessels homeward or outward bound, as well as against belligerent proceedings generally, within an inconvenient approach towards British territory."

Mr. Madison, Sec. of State, to Messrs. Monroe and Pinkney, plenipotentiaries, London, May 17, 1806, Am. State Papers, For. Rel. III. 119, 121.

Messrs. Monroe and Pinkney were instructed to propose an article prohibiting seizures, searches, and other interruptions by belligerent cruisers within harbors and chambers formed by headlands, or anywhere at sea, within 4 leagues of shore; but it was stated that, that distance could not be obtained, "any distance not less than one sea league may be substituted in the article."

The leading illustration of the distinction that has sometimes been drawn between the exercise by a nation of its protective power and the claim of exclusive possession and jurisdiction, is found in the position taken by the French Government in the case of the *Alabama* and the *Kearsarge* in 1864. When the *Kearsarge* appeared off Cherbourg, France, in pursuit of the *Alabama*, which was then lying in that harbor, M. Drouyn de l'Huys, the French minister of foreign affairs, who had been advised that the *Alabama* intended to meet the *Kearsarge*, and that the ships probably would attack each other as soon as they were three miles off the coast, made to Mr. Dayton, minister of the United States, in an interview, the following statement: "That a sea fight would thus be got up in the face of France, and at a distance from their coast within reach of the guns used on shipboard in these days. That the distance to which the neutral right of an adjoining government extended itself from the coast was unsettled, and that the reason of the old rules, which assumed that three miles was the outermost reach of a cannon shot, no longer existed, and that, in a word, a fight on or about such a distance from the coast would be offensive to the dignity of France and they would not permit it." Mr. Dayton replied that "no other rule than the three mile rule was known or recognized as a principle of international law," but that, "if a fight were to take place, and we would let nothing and risk nothing by its being further off, I had, of course, no objection."<sup>a</sup> Mr. Dayton immediately advised Captain Winslow of the *Kearsarge*, by letter, of the representations of M. Drouyn

<sup>a</sup> Mr. Dayton, min. to France, to Mr. Seward, Sec. of State, June 17, 1864, Dip. Cor. 1864, III. 104.

l'Huys, and added: "Under such circumstances I do not suppose that they would have, on principles of international law, the least right to interfere with you if three miles off the coast; but if you lose nothing by fighting six or seven miles off the coast instead of three, you had best do so. You know better than I . . . whether the pretense of the *Alabama* of a readiness to meet you is more than a pretense, and I do not wish you to sacrifice any advantage if you have it. I suggest only that you avoid all *unnecessary* trouble with France; but if the *Alabama* can be taken without violating any rules of international law, and may be lost if such a principle is yielded, you know what the Government would expect of you. You will, of course, yield no real advantage to which you are entitled, while you are careful to so act as to make, *uselessly*, no unnecessary complications with the Government." This letter was duly delivered to Captain Winslow, but the messenger, by whom it was sent, found, on his arrival at Cherbourg, that the prefect had already made known the wishes of the French Government as to the distance within which a fight should not occur. The fight took place on the morning of June 19, 1864. When the *Alabama* left the harbor she was accompanied by a French man-of-war, apparently for the purpose of seeing that the battle was not begun too near the shore. It began soon after the man-of-war left the *Alabama*. The *Kearsarge* was then lying probably from seven to nine miles off shore. The fight lasted an hour and a half, and the *Alabama*, when she began to fill, made for the coast, from which she was five miles distant when she sank.<sup>b</sup> In acknowledging the receipt of Mr. Dayton's report of the transaction. Mr. Seward said: "I approve of your instructions to Captain Winslow. It will be proper for you, nevertheless, while informing M. Drouyn de l'Huys that I do so in a spirit of courtesy towards France, to go further, and inform him that the United States do not admit a right of France to interfere with their ships of war at any distance exceeding three miles. Especially must we disallow a claim of France so to interfere in any conflict that we may find it necessary to wage in European waters with piratical vessels like the *Alabama*, built, armed, manned, and equipped, and received as a belligerent in opposition to our persistent remonstrances to commit depredations on our commerce."<sup>c</sup>

<sup>a</sup> Mr. Dayton, min. to France, to Capt. Winslow, of the *Kearsarge*, undated. Dip. Cor. 1864, III. 104-105.

<sup>b</sup> Dip. Cor. 1864, III. 106-109, 111-112.

<sup>c</sup> Mr. Seward, Sec. of State, to Mr. Dayton, min. to France, July 2, 1864. Dip. Cor. 1864, III. 120-121.

Wharton, in his Int. Law Dig. I. § 32, p. 114, referring to the position of the French Government, says:

"Nor does this reason apply exclusively to hostile operations. We can con-

## (8) REVENUE ACTS.

## § 151.

"The British 'hovering act,' passed in 1736 (9 Geo. II., cap. 35) assumes, for certain revenue purposes, a jurisdiction of four leagues from the coasts, by prohibiting foreign goods to be transhipped within that distance without payment of duties. A similar provision is contained in the revenue laws of the United States, and both the provisions have been declared by judicial authority in each country to be consistent with the law and usage of nations."

Wheaton, Int. Law (Dana's ed.), § 179.

The provision in the revenue laws of the United States, embodied in act of March 2, 1797, § 27, reads, as incorporated into the Revised Statutes, as follows:

"SEC. 2760. The officers of the revenue cutters shall respectively be deemed officers of the customs, and shall be subject to the direction of such collectors of the revenue, or other officers thereof, as from time to time shall be designated for that purpose. They shall go aboard all vessels which arrive within the United States or within four leagues of the coast thereof, if bound for the United States, to search and examine the same, and every part thereof, and shall

receive, for instance, of a case in which armed vessels of nations, with whom we are at peace, might select a spot within cannon range of our coast for the practice of their guns. A case of this character took place not long since in which an object on shore was selected as a point at which to aim, for the purpose of practicing, projectiles to be thrown from the cruiser of a friendly power. Supposing such a vessel to be four miles from the coast, could it be reasonably maintained that we have no police jurisdiction over such culpable negligence? Could it be reasonably maintained that marauders, who at the same time would not be technically pirates, could throw projectiles upon our shores without having jurisdiction to bring them to justice? The answer to such questions must be drawn from the reason that sustained a claim for a three-mile police belt at sea in old times. This reason authorizes the extension of this belt for police purposes to nine miles, if such be the range of cannon at the present day. It should be remembered, does not subject to our domestic jurisdiction all vessels passing within nine miles of our shores, nor does it by itself give us an exclusive right to fisheries within such a limit, or within such greater limits as greater improvements in gunnery might suggest; nor would it authorize the Executive to warn off, within these extended limits, foreign ships by a proclamation similar to that of President Jefferson, in 1807, so as to prevent them from communicating with the shore. For the latter purposes the three-mile limit is the utmost that can be claimed."

So far as these observations relate to criminal acts, it may be remarked that it is universally admitted that jurisdiction of offences may be derived from locality either of the act or of the actor. The distinction really sought to be made is that between preventive police and the claim of territorial jurisdiction, and, in case of an offence actually committed, between the right to punish the offender, if he comes within the jurisdiction or is brought there by extradition, and the right to arrest him outside of it.

demand, receive, and certify the manifests required to be on board certain vessels, shall affix and put proper fastenings on the hatches and other communications with the hold, of any vessel, and shall remain on board such vessels until they arrive at the port or place of their destination."

"The statement in the text [of Wheaton, above quoted] requires further consideration. It has been seen that the consent of nations extends the territory of a state to a marine league or cannon-shot from the coast. Acts done within this distance are within the sovereign territory. The war right of visit and search extends over the whole sea, but it will not be found that any consent of nations can be shown in favor of extending what may be strictly called territoriality, for any purpose whatever, beyond the marine league or cannon-shot. Doubtless states have made laws for revenue purposes touching acts done beyond territorial waters, but it will not be found that, in later times, the right to make seizures beyond such waters has been insisted upon against the remonstrance of foreign states, or that a clear and unequivocal judicial precedent now stands sustaining such seizures when the question of jurisdiction has been presented. The revenue laws of the United States, for instance, provide that if a vessel bound to a port in the United States, shall, except from necessity, unload cargo within 4 leagues from the coast, and before coming to the proper port for entry and unloading, and receiving permission to do so, the cargo is forfeit, and the master incurs a penalty (Act 2d March, 1797, § 27); but the statute does not authorize a seizure of a foreign vessel when beyond the territorial jurisdiction. The statute may well be construed to mean only that a foreign vessel, coming to an American port, and there seized for a violation of revenue regulations committed out of the jurisdiction of the United States, may be confiscated; but that, to complete the forfeiture, it is essential that the vessel shall be bound to and shall come within the territory of the United States after the prohibited act. The act done beyond the jurisdiction is assumed to be part of an attempt to violate the revenue laws within the jurisdiction. Under the previous sections of that act it is made the duty of revenue officers to board all vessels for the purpose of examining their papers within four leagues of the coast. If foreign vessels have been boarded and seized on the high sea, and have been adjudged guilty, and their Governments have not objected, it is probably either because they were not appealed to or have acquiesced in the particular instance from motives of comity.

"The cases cited in the author's note do not necessarily and strictly sustain the position taken in the text. In the *Louis* (Dodson, ii, 245), the arrest was held unjustified, because made in time of peace for a violation of municipal law beyond territorial waters. The words of

Sir William Scott, on pages 245 and 246, with reference to the hovering acts, are only illustrative of the admitted rule that neighboring waters are territorial; and he does not say, even as an *obiter dictum*, that the territory for revenue purposes extends beyond that claimed for other purposes. On the contrary, he says that an inquiry for fiscal or defensive purposes, near the coast, but beyond the marine league, as under the hovering laws of Great Britain and the United States, 'has nothing in common with the right of visitation and search upon the unappropriated parts of the ocean;' and adds, 'a recent Swedish claim of examination on the high seas, though confined to foreign ships bound to Swedish ports, and accompanied, in a manner not very consistent or intelligible, with a disclaimer of all right of visitation, was resisted by the British Government, and was finally withdrawn.'

Dana, note 108, Wheaton's Int. Law. § 179, p. 258.

Two policies of insurance were obtained on the cargo of the brig *Aurora*, from New York to one or two Portuguese ports in Brazil. In each policy there was an exception of the risk of seizure for illicit trade with the Portuguese. The vessel was cleared out for the Cape of Good Hope, but proceeded to Rio de Janeiro, where she disposed of part of her cargo. Sailing then for Para, she fell in with the American schooner *Four Sisters*, bound for the same port, and the two vessels agreed to keep company. In due time they came to anchor about four or five leagues from land, off the mouth of the river Para, and certain members of the crew of each vessel went off in the schooner's long boat to speak to a Portuguese boat seen inshore, with a view, as they alleged, to procure a pilot to take the vessels up the river, in order that they might obtain a supply of wood and water, and, if permitted, *sell their cargo*. After the long boat had put off, the master of the brig went on board the schooner, and the latter proceeded toward the shore, in the hope of finding a pilot, and while so doing compelled, by firing, a Portuguese schooner to come to and her master to come on board, greatly to the alarm of the latter, who supposed that the vessels were French and enemies. Meanwhile, the persons who had gone ashore in the long boat were seized and imprisoned, and a day or two afterwards both the brig and the schooner were taken possession of by a body of armed men in boats, and carried into Para, where, with their cargoes, they were condemned on the ground that they were attempting to trade in violation of the laws of Portugal.

An action on the case on the two policies on the cargo of the brig was brought in the circuit court of the United States for the district of Massachusetts and a verdict was found for the defendant, Mr.

Justice Cushing, who charged the jury, saying that, while it was contended that the brig was not within the Portuguese dominions and therefore not violating any of their laws, it appeared that she "was hovering on the coast of Para and anchored upon that coast, and that the plaintiff, with others from the vessel, went on shore in the boat among the inhabitants."

Before the Supreme Court it was argued for the plaintiff that as the vessel was "seized five leagues from the land, at anchor on the high seas," she was not within the territorial jurisdiction of Portugal and not liable to seizure, and that though the supercargo went ashore he went for water, which was legal, and did not bring the vessel into port.

For the defendant it was argued that the vessels, though four or five leagues from Cape Baxos, were in the Bay of Para, within the jurisdiction of Portugal; that, besides, the rule of cannon shot did not apply to the right to cause the revenue laws to be respected, as was shown by the laws of the United States; that the act of the supercargo in going ashore really for the purpose of trading, and the forcing the Portuguese schooner to come to, would have given a right to seize the vessels, even if they had not been within the territorial jurisdiction.

Marshall, C. J., delivering the opinion of the court, said that the right of a nation to secure itself from injury might "certainly be exercised beyond the limits of its territory;" that a nation had a right to prohibit commerce with its colonies, and to use the necessary means to prevent the violation of the laws made to protect that right; that these means did not appear "to be limited within any certain marked boundaries, which remain the same at all times and in all situations;" that in "different seas and on different coasts, a wider or more contracted range" would be assented to; that in the channel, for example, where a great part of the commerce with the north of Europe passes through a very narrow sea, the seizure of vessels suspected of attempting an illicit trade must necessarily be restricted to very narrow limits, while on the coast of South America, seldom frequented by vessels but for purposes of illicit trade, the vigilance of the Government might "be extended somewhat further;" and that the fact that such vigilance was not always restricted to cannon shot was shown by the act of Congress giving revenue cutters the right to visit vessels four leagues from the coast. The seizure of the brig, therefore, was not an act of lawless violence.

*Church v. Hubbard* (1804), 2 Cranch, 187, 234.

"It is true, that Chief Justice Marshall [in *Church v. Hubbard*] admitted the right of a nation to secure itself against intended viola-



tions, of its laws, by seizures made within reasonable limits, as to which, he said, nations must exercise comity and concession, and the exact extent of which was not settled; and, in the case before the court, the four leagues were not treated as rendering the seizure illegal. This remark must now be treated as an unwarranted admission. The result of the decision is, that the court did not undertake to pronounce judicially, in a suit on a private contract, that a seizure of an American vessel, made at four leagues, by a foreign power, was void and a mere trespass. In the subsequent case of *Rose v. Himely* (Cranch, iv, 241), where a vessel was seized ten leagues from the French coast, and taken to a Spanish port, and condemned in a French tribunal under municipal and not belligerent law, the court held that any seizures for municipal purposes beyond the territory of the sovereign are invalid; assuming, perhaps, that ten leagues must be beyond the territorial limits for all purposes. In *Hudson v. Guestier* (Cranch, iv, 293), where it was agreed that the seizure was municipal, and was made within a league of the French coast, the majority of the court held that the jurisdiction to make a decree of forfeiture was not lost by the fact that the vessel was never taken into a French port, if possession of her was retained, though in a foreign port. The judgment being set aside and a new trial ordered, the case came up again, and is reported in Cranch, vi, 281. At the new trial the place of seizure was disputed; and the judge instructed the jury, that a municipal seizure, made within six leagues of the French coast, was valid, and gave a good title to the defendant. The jury found a general verdict for the defendant, and exceptions were taken to the instructions. The Supreme Court sustained the verdict; not, however, upon the ground that a municipal seizure made at six leagues from the coast was valid, but on the ground that the French decree of condemnation must be considered as settling the facts involved; and if a seizure within a less distance from shore was necessary to jurisdiction, the decree may have determined the fact accordingly, and the verdict in the circuit court did not disclose the opinion of the jury on that point. The judges differed in stating the principle of this case and of *Rose v. Himely*; and the report leaves the difference somewhat obscure.

“This subject was discussed incidentally in the case of the *Cagliari*, which was a seizure on the high seas, not for violation of revenue laws, but on a claim, somewhat mixed, of piracy and war. In the opinion given by Dr. Twiss to the Sardinian Government in that case, the learned writer refers to what has sometimes been treated as an exceptional right of search and seizure, for revenue purposes, beyond the marine league, and says that no such exception can be sustained as a right. He adds: ‘In ordinary cases, indeed, where a merchant

ship has been seized on the high seas, the sovereign whose flag has been violated waives his privilege, considering the offending ship to have acted with *mala fides* towards the other state with which he is in amity, and to have consequently forfeited any just claim to his protection.' He considers the revenue regulations of many states, authorizing visit and seizure beyond their waters, to be enforceable at the peril of such states, and to rest on the express or tacit permission of the states whose vessels may be seized.

"It may be said that the principle is settled that municipal seizures cannot be made, for any purpose, beyond territorial waters. It is also settled that the limit of these waters is, in the absence of treaty, the marine league or the cannon-shot."

Dana, note 108, Wheaton's Int. Law, § 179, pp. 259-260.

By Article V. of the treaty of Guadalupe-Hidalgo, February 2, 1848, it was provided that the boundary between the United States and Mexico should "commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande."

This phrase is repeated in Article I. of the treaty of December 30, 1853, relating to the cession to the United States of the Mesilla Valley.

"I have had the honor to receive your note of the 30th April last objecting, on behalf of the British Government, to that clause in the fifth article of the late treaty between Mexico and the United States by which it is declared that 'the boundary line between the two Republics shall commence in the Gulf of Mexico three leagues from land,' instead of one league from land, which you observe 'is acknowledged by international law and practice as the extent of territorial jurisdiction over the sea that washes the coasts of states.'

"In answer I have to state, that the stipulation in the treaty can only affect the rights of Mexico and the United States. If for their mutual convenience it has been deemed proper to enter into such an arrangement, third parties can have no just cause of complaint. The Government of the United States never intended by this stipulation to question the rights which Great Britain or any other power may possess under the law of nations."

Mr. Buchanan, Sec. of State, to Mr. Crampton, British min., Aug. 19, 1848, MS. Notes to Gr. Britain, VII. 185.

"I have the honor to acknowledge the receipt of your letter of yesterday and to return the despatch of Commodore H. H. Bell, which accompanied it. The stipulation in the treaty of Guadalupe-Hidalgo by which the boundary between the United States was begun in the Gulf three leagues from land is still in force. It was intended, however, to regulate within those limits the rights and duties of the parties to the instrument only. It could not affect the rights of any other power under the law of nations. It seems that the peculiarity

of the clause adverted to attracted the notice of the British Government. A copy of the reply of this Department upon the subject herewith enclosed." (Mr. Seward, Sec. of State, to Mr. Welles, S. of Navy, Sept. 3, 1863, 61 MS. Dom. Let. 499.)

"We have always understood and asserted that, pursuant to public law, no nation can rightfully claim jurisdiction at sea beyond marine league from its coast.

"This opinion on our part has sometimes been said to be inconsistent with the facts that, by the laws of the United States, revenue cutters are authorized to board vessels anywhere within four leagues of their coasts, and that by the treaty of Guadalupe-Hidalgo, called, between the United States and Mexico, of the 2d of February, 1848, the boundary line between the dominions of the parties began in the Gulf of Mexico, three leagues from land.

"It is believed, however, that in carrying into effect the authority conferred by the act of Congress referred to, no vessel is boarded, boarded at all, except such a one as, upon being hailed, may have answered that she was bound to a port of the United States. At such events, although the act of Congress was passed in the infancy of this Government, there is no known instance of any complaint on the part of a foreign Government of the trespass by a commander of a revenue cutter upon the rights of its flag under the law of nations.

"In respect to the provision in the treaty with Mexico, it may be remarked that it was probably suggested by the passage in the act of Congress referred to, and designed for the same purpose, that of preventing smuggling. By turning to the files of your legation, you will find that Mr. Bankhead, in a note to Mr. Buchanan of the 30th of April, 1848, objected on behalf of Her Majesty's Government, to the provision in question. Mr. Buchanan, however, replied in a note of the 19th of August, in that year, that the stipulation could only affect the rights of Mexico and the United States, and was never intended to trench upon the rights of Great Britain, or of any other power under the law of nations."

Mr. Fish, Sec. of State, to Sir Edward Thornton, Brit. min., Jan. 22, 1875. For. Rel. 1875, I. 649-650.

An attack by Mexican officials on merchant vessels of the United States, when distant more than three miles from the Mexican coast, on the ground of breach of revenue laws, is an international offense which is not cured by a decree in favor of the assailants, collusion or corruptly maintained in a Mexican court.

Mr. Evarts, Sec. of State, to Mr. Foster, Apr. 19, 1879, MS. Inst. XIX. 570.

In 1889-1890, a correspondence took place between the United States and Mexico in relation to the execution of Mexican criminal process against the American schooner *Robert Ruff*, when, as the master of

schooner alleged, she was nine miles from land. The Mexican Government, on the other hand, stated that the schooner was only two and a-half miles from the coast; that she had been farther out to sea, but had tacked and come inshore in order to meet a boat carrying a fugitive whom she was assisting to escape. (For. Rel. 1890, 620-623, 629-631. See, also, For. Rel. 1889, 611-614.)

"I have received your No. 108 of the 29th of January ultimo, with its accompanying copy and translation of the note addressed to you on the 24th of that month by the minister of state, giving the results of the investigation ordered by the Spanish Government of the circumstances under which the American vessels Ethel A. Merritt, Eunice P. Newcomb, George Washington, and Hattie Haskell were fired upon and visited by Spanish gunboats, near the island of Cuba, in May, June, and July of last year. . . .

"The wide contradiction between the several statements does not suffice to bring the position of three of the vessels at the time within the customary nautical league. This Government must adhere to the three-mile rule as the jurisdictional limit, and the cases of visitation *without that line* seem not to be excused or excusable under that rule.

"This Government frankly and fully accepts the disclaimer of the Government of His Majesty that any intention of discourtesy existed in these proceedings. It insists, however, on the importance of a clear understanding of the jurisdictional limit. It insists likewise, on the distinction between the verification (according to the usual procedure of revenue cruisers), within a reasonable range of approach, of vessels seeking Spanish ports in the due pursuit of trade therewith, and the arrest by armed force, without the jurisdictional three-mile limit, of vessels not bound to Spanish ports. The considerations on these heads, advanced in my instruction to you of August 11, seem not to have attracted from His Majesty's Government the attention due to their precise bearing on at least three of the cases in hand under the express admissions of Mr. Elduayèn's note."

Mr. Evarts, Sec. of State, to Mr. Fairchild, min. to Spain, No. 111, March 3, 1881, For. Rel. 1881, 1051.

#### (7) PROPOSED EXTENSION OF TERRITORIAL ZONE.

### § 152.

"Spain claims a maritime jurisdiction of six miles around the island of Cuba. In pressing this claim upon the consideration of the United States, Spain has used the argument that the modern improvement in gunnery renders the ancient limit of a marine league inadequate to the security of neutral states.

"When it was understood at Paris that an engagement was likely to come off before Cherbourg between the United States ship of war

Kearsarge and the pirate *Alabama*, the French Government remonstrated with both parties against firing within the actual reach of the shore by cannon balls fired from their vessels, on the ground that the effect of a collision near the coast would be painful to France.

"For these reasons I think that the subject may now be profitably discussed, but there are some preliminary considerations which it is deemed important to submit to Her Majesty's Government:

"First. That the United States, being a belligerent now, when the other maritime states are at peace, are entitled to all the advantages of the existing construction of maritime law, and cannot, without serious inconvenience, forego them.

"Secondly. That the United States, adhering in war, no less than when they were in the enjoyment of peace, to their traditional liberality towards neutral rights, are not unwilling to come to an understanding upon the novel question which has thus been raised in consequence of the improvement in gunnery.

"But, thirdly, it is manifestly proper and important that any such new construction of the maritime law as Great Britain suggests should be reduced to the form of a precise proposition, and then that it should receive, in some manner, by treaty or otherwise, reciprocal and obligatory acknowledgments from the principal maritime powers.

"Upon a careful examination of the note you have addressed to me, the suggestions of Her Majesty's Government seem to be expressed in too general terms to be made the basis of discussion. Suppose, by way of illustration, that the utmost range of cannon now is five miles, are Her Majesty's Government understood to propose that the marine boundary of neutral jurisdiction, which is now three miles from the coast, shall be extended two miles beyond the present limit? Again, if cannon shot are to be fired so as to fall not only not upon neutral land, but also not upon neutral waters, then, supposing the range of cannon shot to be five miles, are Her Majesty's Government to be understood as proposing that cannon shot shall not be fired within a distance of eight miles from the neutral territory?

"Finally, shall measured distances be excluded altogether from the statement, and the proposition to be agreed upon be left to extend with the increased range of gunnery, or shall there be a pronounced limit of jurisdiction, whether five miles, eight miles, or any other measured limit?"

Mr. Seward, Sec. of State, to Mr. Burnley, British chargé, Sept. 16, 1864, *Dip. Cor.* 1864, II. 708-709.

Field, in his *Int. Code*, 2nd ed. § 28, observes that, "inasmuch as cannon shot can now be sent more than two leagues, it seems desirable to extend the territorial limits accordingly."

Perels, *Das Internationale öffentliche Seerecht der Gegenwart*, § 13, says: "The extension of the line depends on the range of cannon shot at

the particular period. It is, however, at such period the same for all coasts."

See, also, Rivier, *Principes du Droit des Gens*, I. 145; Bluntschli, § 302; Heffter, § 75; Hall, *Int. Law* (4th ed.), 160.

At its meeting in Paris in 1894 the Institut de Droit International discussed the subject of territorial waters, and particularly the question whether the jurisdictional limits should be extended. It was generally agreed that such an extension should be made, but there were differences of opinion as to how far it should be carried and as to the principles on which it should be based. It was finally resolved that territorial waters should extend six marine miles (60 to the degree of latitude) from low-water mark for all purposes, and that in time of war the bordering neutral state might fix, either by a declaration of neutrality or by special notification, a neutral zone beyond the six miles as far as the range of cannon shot for all purposes of neutrality. It was also resolved that in bays the territorial zone should follow the sinuosities of the coast, except that it should be measured from a straight line across the bay at the place nearest the entrance where the distance from shore to shore first became contracted to twelve marine miles, unless usage had established a more extensive jurisdiction.

Institut de Droit International, *Annuaire* (1894-95), XIII. 329; Hall, *Int. law* (4th ed.), 161.

"In conformity with your recent oral request, I have now the honor to make further response to your unofficial note of November 5th last, which was acknowledged on the 9th of the same month, by informing you that careful consideration would be given to the important inquiry therein made as to the views of the United States Government touching the expediency of settling by treaty among the interested powers the question of the extent of territorial jurisdiction over maritime waters.

"This Government would not be indisposed, should a sufficient number of maritime powers concur in the proposition, to take part in an endeavor to reach an accord having the force and effect of international law as well as of conventional regulation, by which the territorial jurisdiction of a State, bounded by the high seas, should henceforth extend six nautical miles from low-water mark, and at the same time providing that this six-mile limit shall also be that of the neutral maritime zone.

"I am unable, however, to express the views of this Government upon the subject more precisely at the present time, in view of the important consideration to be given to the question of the effect of such a modification of existing international and conventional law upon the jurisdictional boundaries of adjacent States and the applica-

tion of existing treaties in respect to the doctrine of headlands and bays.

"I need scarcely observe to you that an extension of the headland doctrine, by making territorial all bays situated within promontories twelve miles apart instead of six, would affect bodies of water not deemed to be high seas and whose use is the subject of existing conventional stipulations."

Mr. Olney, Sec. of State, to Mr. de Weckherlin, Dutch min., Feb. 15, 1881. MS. notes to the Netherlands, VIII. 359.

The inquiry of the Dutch minister referred to the discussion of the question of territorial waters by the Institute of International Law in 1894. (Mr. Olney to Mr. de Weckherlin, Nov. 9, 1895, MS. notes to the Neth., VIII. 355.)

See, also, Mr. Olney, Sec. of State, to Mr. Dupuy de Lome, Spanish min., May 4, 1896, MS. notes to Spain, XI. 163.

#### 8. BAYS.

#### § 153.

"The essential facts are, That the river Delaware takes its rise within the limits of the United States;

**Delaware Bay.**

"That, in the whole of its descent to the Atlantic Ocean, it is covered on each side by the territory of the United States

"That, from tide water, to the distance of about sixty miles from the Atlantic Ocean, it is called the *river* Delaware;

"That, at this distance from the sea, it widens and assumes the name of the *Bay* of Delaware, which it retains to the mouth;

"That its mouth is formed by the capes Henlopen and May; the former belonging to the State of Delaware, in property and jurisdiction, the latter to the State of New Jersey;

"That the Delaware does not lead from the sea to the dominion of any foreign nation;

"That, from the establishment of the British provinces on the banks of the Delaware to the American Revolution, it was deemed the peculiar navigation of the British Empire;

"That, by the treaty of Paris, on the third day of September, 1763, his Britannic Majesty relinquished, with the privy of France, the sovereignty of those provinces, as well as of the other provinces and colonies;

"And that the *Grange* was arrested in the Delaware, within the capes, before she had reached the sea, after her departure from the port of Philadelphia.

"It is a principle, firm in reason, supported by the civilians, and tacitly approved in the document transmitted by the French minister, that, to attack an enemy in a neutral territory, is absolutely unlawful

"Hence the inquiry is reduced to this simple form, whether the place of seizure was in the territory of the United States?

"From a question originating under the foregoing circumstances, is obviously and properly excluded every consideration of a dominion over the *sea*. The solidity of our neutral right does not depend, in this case, on any of the various distances claimed on that element by different nations possessing the neighboring shore; but if it did, the field would probably be found more extensive, and more favorable to our demand, than is supposed by the document above referred to. For the *necessary* or *natural* law of nations, unchanged as it is, in this instance, by any compact or other obligation of the United States, will, perhaps, when combined with the treaty of Paris in 1783, justify us in attaching to our coasts an extent into the sea beyond the reach of cannon shot.

"In like manner is excluded every consideration, how far the spot of seizure was capable of being defended by the United States. For, although it will not be conceded that this could not be done, yet will it rather appear, that the mutual rights of the States of New Jersey and Delaware, up to the middle of the river, supersede the necessity of such an investigation.

"No; the corner stone of our claim is, that the United States are proprietors of the lands on both sides of the Delaware, from its head to its entrance into the sea.

"The high ocean, *in general*, it is true, is unsusceptible of becoming property. It is a gift of nature, manifestly destined for the use of all mankind; inexhaustible in its benefits; not admitting metes and bounds. But rivers may be appropriated, because the reverse is their situation. Were they open to all the world, they would prove the inlets of perpetual disturbance and discord; would soon be rendered barren by the number of those who would share in their products; and moreover they may be defined.

"A river, considered merely as such, is the property of the people through whose lands it flows, or of him under whose jurisdiction that people is.—*Grot.*, b. 2, c. 2, s. 12.

"Rivers might be held in property; though neither where they rise, nor where they discharge themselves, be within our territory, but they join to water above and below, or the sea. It is sufficient for us that the larger portion of water, that is, the sides, is shut up in our banks, and that the river, in respect to our land, is itself small and insignificant.—*Grot.*, b. 2, c. 3, s. 7; and *Barbeyrac*, in his note, subjoins, that neither of these is necessary.

"Rivers may be the property of whole states.—*Puff.*, b. 3, c. 3, s. 4.

"To render a thing capable of being appropriated, it is not strictly necessary that we should enclose it, or be able to enclose it, within



artificial bounds, or such as are different from its own substance; is sufficient, if the compass and extent of it can be any way determined. And therefore Grotius hath given himself a needless trouble when, to prove rivers capable of property, he useth the argument that, although they are bounded by the land at neither end, but unit to the other rivers or the sea, yet it is enough that the greater part of them—that is, their sides—are enclosed.’—*Puff.*, b. 4, c. 5, s. 3.

“ ‘When a nation takes possession of a country in order to set there, it possesses everything included in it, as lands, lakes, rivers &c.—’ *Vattel*, b. 1, c. 22, s. 266.

“To this list might be added Bynkershoek and Selden. But the dissertation of the former, *de dominio maris*, cannot be quoted with advantage in detachment; and the authority of the latter, on the head, may, in the judgment of some, partake too much of affection for the hypothesis of *mare clausum*. As Selden, however, sinks in influence on this question, so must Grotius rise, who contended for *mare liberum*; and his accurate commentator, Rutherford, confirms his principles in the following passage: ‘A nation, by settling upon any tract of land, which at the time of such settlement had no other owner, acquires, in respect of all other nations, an exclusive right full or absolute property, not only in the land, but in the waters likewise that are included within the land, such as rivers, pools, creeks or bays. The absolute property of a nation, in what it has thus seized upon, is its right of territory.’—2 *Ruth.*, b. 2, c. 9, s. 6.

“Congress, too, have acted on these ideas, when, in their collective laws, they ascribe to a State the rivers wholly within that State.

“It would seem, however, that the spot of seizure is attempted to be withdrawn from the protection of these respectable authorities being in the *Bay* of Delaware; instead of the *river* Delaware.

“Who can seriously doubt the identity of the *river* and *bay* Delaware? How often are different portions of the same stream denominated differently? This is sometimes accidental; sometimes for no other purpose than to assist the intercourse between man and man, by easy distinctions of space. Are not this river and this bay fed by the same springs from the land, and the same tides from the ocean? Are not both doubly flanked by the territory of the United States? Have any local laws, at any time, provided variable arrangements for the river and the bay? Has not the jurisdiction of the contiguous States been exercised equally on both?

“But suppose that the *river* was dried up, and the *bay* alone remained, Grotius continues the argument of the 7th section, of the 2d chapter, of the 2d book above cited, in the following words:

“ ‘By this instance it seems to appear, that the property and do-

ion of the sea might belong to him, who is in possession of the land on both sides, though it be open above, as a gulf, or above and below, as a strait: provided it is not so great a part of the sea, that, when compared with the land on both sides, it can not be supposed to be some part of them. And now, what is thus lawful to one king or people, may be also lawful to two or three, if they have a mind to take possession of a sea, thus enclosed within their lands; for it is in this manner that a river, which separates two nations, has first been possessed by both, and then divided.'

"The gulfs and channels, or arms of the sea, are, according to the regular course, supposed to belong to the people with whose lands they are encompassed."—*Puff.*, b. 4, c. 5, s. 8.

"Valin, in b. 5, tit. 1, p. 685, of his commentary on the marine ordonnance of France, virtually acknowledges that particular seas may be appropriated. After reviewing the contest between Grotius and Selden, he says: 'S'il (Selden) s'en fût donc tenu là, ou plutôt s'il eût distingué l'océan des mers particulières, et même dans l'océan l'étendue de mer qui doit être censée appartenir aux souverains des côtes qui en sont baignées, sa victoire eût été complète.'

"These remarks may be enforced by asking, What nation can be injured in its rights, by the Delaware being appropriated to the United States? And to what degree may not the United States be injured, on the contrary ground? It communicates with no foreign dominion; no foreign nation has, ever before, exacted a community of right in it, as if it were a main sea: under the former and present governments, the exclusive jurisdiction has been asserted: by the very first collection law of the United States, passed in 1789, the county of Cape May, which includes Cape May itself, and all the waters thereof, theretofore within the jurisdiction of the State of New Jersey, are comprehended in the district of Bridgetown. The whole of the State of Delaware, reaching to Cape Henlopen, is made one district. Nay, unless these positions can be maintained, the bay of Chesapeake, which, in the same law, is so fully assumed to be within the United States, and which, for the length of the Virginia territory, is subject to the process of several counties to any extent, will become a rendezvous to all the world, without any possible control from the United States. Nor will the evil stop here. It will require but another short link in the process of reasoning, to disappropriate the mouths of some of our most important rivers. If, as Vattel inclines to think in the 294th section of his first book, the Romans were free to appropriate the Mediterranean, merely because they secured, by one single stroke, the immense range of their coast, how much stronger must the vindication of the United States be, should they adopt maxims for prohibiting foreigners from gaining, without permission, access into the heart of their country.

"This inquiry might be enlarged by a minute discussion of the practice of foreign nations, in such circumstances. But I pass it by; because the United States, in the commencement of their career, ought not to be precipitate in declaring their approbation of any usages, (the precise facts concerning which we may not thoroughly understand) until those usages shall have grown into principles, and are incorporated into the law of nations; and because no usage has ever been accepted, which shakes the foregoing principles.

"The conclusion then is, that the *Grange* has been seized on neutral ground. If this be admitted, the duty arising from the illegal act is restitution."

Opinion of Edmund Randolph, At. Gen., May 14, 1793, on the case of the British ship *Grange*, seized in the Delaware Bay by the French frigate *L'Embascade*, Am. State Pap. For. Rel. I. 148; 1 Op. At. Gen. 32.

"The State of Delaware has uniformly claimed the sole and exclusive jurisdiction over the whole of the Delaware Bay to low-water mark on the Jersey shore. . . . On the part of the United States there has been no resistance of this claim. . . . On the part, also, of the State of New Jersey, this claim, though resisted in its full extent, has been partially acceded to and acknowledged, that State having limited her claim of jurisdiction to the main ship channel of the bay." (State v. Morris, 1 Harr. (Del.) 326.)

The Bristol Channel is an arm of the sea dividing England from Wales. Beginning at the river Severn, it attains, in **Bristol Channel.** its decent of more than 90 miles, a considerable width—much greater than that of Conception Bay, in Newfoundland. In 1858 certain persons, said to be American citizens, were indicted in the county of Glamorgan for the offence of felonious wounding, committed on an American vessel in the Penarth Roads, in Bristol Channel, three-quarters of a mile from the coast of Glamorganshire, at a spot never left dry by the tide, but within a quarter of a mile from land which is so left dry. The place in question was between Glamorganshire and the Flat Holms, an island treated as part of the county of Glamorgan, the ship being at the time two miles from the island on the inside. It was about ten miles from the opposite shore of Somersetshire, and 90 miles from the Roads to the mouth of the channel. It was held that the part of the sea where the vessel lay was within the body of the county of Glamorgan. Cockburn, C. J., delivering the opinion of the court, said:

"The sea in question is part of the Bristol Channel, both shores of which form part of England and Wales, of the county of Somerset on the one side and the county of Glamorgan on the other. We are of opinion that, looking at the local situation of this sea, it must be taken to belong to the counties respectively by the shores of which it is bounded; and the fact of the Holms, between which and the shore

of the County of Glamorgan the place in question is situated, having always been treated as part of the parish of Cardiff and as part of the county of Glamorgan, is a strong illustration of the principle on which we proceed, namely, that the whole of this inland sea between the counties of Somerset and Glamorgan is to be considered as within the counties by the shores of which its several parts are respectively bounded. We are therefore of opinion that the place in question is within the body of the county of Glamorgan."

*Reg. v. Cunningham* (1859), *Bell's C. C.* 72, 86. See a discussion of this case in *Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1877), *L. R.* 2 App. Cas. 394.

Conception Bay lies on the eastern side of Newfoundland, between two promontories, the southern ending at Cape St. Francis and the northern at Split Point. The bay is well marked, the distance from its head to Cape St. Francis being about 40 miles, and from its head to Split Point about 50 miles. The average width is about 15 miles, but the distance from Cape St. Francis to Split Point is rather more than 20 miles. A telegraph company having laid a cable to a buoy more than 30 miles within the bay, but at no point within 3 miles of the shore, a question was raised as to the territorial dominion over a body of water of such configuration and dimensions as that in question. The court, after examining the subject in the light of the common law and of the law of nations, said:

"It does not appear to their lordships that jurists and text writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the state possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination. If it were necessary in this case to lay down a rule the difficulty of the task would not deter their lordships from attempting to fulfill it. But in their opinion it is not necessary so to do. It seems to them that, in point of fact, the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to show that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important. And moreover (which in a British tribunal is conclusive) the British legislature has by acts of Parliament declared it to be part of the British territory, and part of the country made subject to the legislature of Newfoundland."

*Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1877), *L. R.* 2 App. Cas. 394, citing *Fitzherbert's Abridgment*, "Corone," 399; *Coke*, 4 Institute, 140; *Hale*, *De Jure Maris*, p. 1, c. 4; *Reg. v. Cunningham*, *Bell's C. C.* 86; *Kent's Com.* 29, 30.

By section 5 of the act of June 5, 1882, reestablishing the Court of Commissioners of Alabama Claims, it was provided **Chesapeake Bay.** that the tribunal should receive and examine certain classes of claims, among which were "claims directly resulting from damage done on the high seas by Confederate cruisers during the late rebellion, including vessels and cargoes attacked on the high seas, although the loss or damage occurred within four miles of the shore."

In the case of *Stetson v. The United States*, No. 3993, class 1, a claim was made under this clause for the destruction, in October, 1862, of the ship *Alleganean* in the Chesapeake Bay, by a Confederate naval force, while she lay at anchor in rough water south of the mouth of the Rappahannock River and opposite Guinn's Island. It was established by the evidence that the ship was at the time of her capture and destruction more than four miles from any shore.

The court, in deciding the case, observed that the term "high seas," as used by legislative bodies, had been construed to express widely different meanings. As defining the jurisdiction of admiralty courts, it was held to mean the waters of the sea "exterior to low-water mark." In international law it had been held to mean "only so much of the ocean as is exterior to a line running parallel to the shore and some distance therefrom, commonly such distance as can be defended by artillery upon the shore, and therefore a cannon shot or a marine league (3 nautical or 4 statute miles)." It was in this sense, so the court held, that the term was used in the act of June 5, 1882; and therefore such parts of the waters of the Chesapeake Bay as were within 4 statute miles of either shore formed no part of the high seas in the sense of the act. But, how as to other waters of the bay? "The distance," said the court, "between Cape Henry and Cape Charles, at the entrance of the bay, is said to be 12 miles, and it is stated that lines starting from points between the capes, 4 miles from each, and running up the bay that distance from either shore, would not intercept each other within 125 miles from the starting points. The evidence shows that the *Alleganean* was anchored between such lines at the time of destruction. Was she upon the high seas as the court defines the statutory term?" The court, after citing Phillimore, Int. Law, I. § 200; Grotius, B. II. c. 3, §§ 7, 8; Vattel, I. B. I. c. 23, § 291; Wheaton, Int. Law, Dana's ed. 255; Kent, Com. I. 29, 30; Woolsey, Int. Law, § 60; Wharton, Int. Law, § 192; *Regina v. Cunningham*, Bell's C. C. 72; *Direct Cable Co. v. Anglo-American Tel. Co.*, 2 App. Cas. 349, discussed the physical situation of the Chesapeake Bay, its rise and inclusion within the territory of the United States, and the legislation of the United States and of the States of Maryland and of Virginia concerning it, and reached the following conclusion:

"Considering, therefore, the importance of the question, the con-

figuration of Chesapeake Bay, the fact that its headlands are well marked, and but twelve miles apart, that it and its tributaries are wholly within our own territory, that the boundary lines of adjacent States encompass it; that from the earliest history of the country it has been claimed to be territorial waters, and that the claim has never been questioned; that it cannot become the pathway from one nation to another; and remembering the doctrines of the recognized authorities upon international law, as well as the holdings of the English courts as to the Bristol Channel and Conception Bay, and bearing in mind the matter of the brig *Grange* and the position taken by the Government as to Delaware Bay, we are forced to the conclusion that Chesapeake Bay must be held to be wholly within the territorial jurisdiction and authority of the Government of the United States and no part of the 'high seas' within the meaning of the term as used in section 5 of the act of June 5, 1872."

Second Court of Commissioners of Alabama Claims, *Stetson v. United States*, No. 3993, class 1; Moore, Int. Arbitrations, IV. 4332-4341. The court, in referring to the decision in the case of the *Grange*, said: "It will hardly be said that Delaware Bay is any the less an inland sea than Chesapeake Bay. Its configuration is not such as to make it so, and the distance from Cape May to Cape Henlopen is apparently as great as that between Cape Henry and Cape Charles."

Complaint was made against defendant for taking fish with a purse seine in the waters of Buzzards Bay, within  
**Buzzards Bay.** the jurisdiction of the State of Massachusetts. He was found guilty. The distance between the headlands at the mouth of Buzzards Bay is more than one and less than two marine leagues. The place where the act was committed was within the bay, about a mile and a quarter from the shore, but at a point where the bay is more than two marine leagues wide. By the public statutes of Massachusetts (chap. 1, sec. 12) the territorial limits of the Commonwealth extend one marine league from the seashore at low-water mark. When an inlet or arm of the sea does not exceed two marine leagues in width between its headlands a straight line from one headland to the other is equivalent to the shore line, and the sovereignty and jurisdiction of the Commonwealth are declared to extend to all places within the boundaries thereof, subject to the rights of concurrent jurisdiction granted over places ceded to the United States. "We regard it as established," said the court, "that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from the coast, and that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit, and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving

fish like lobsters, or fish attached to or imbedded in the soil. The open sea within this limit is, of course, subject to the common right of navigation, and all governments, for the purpose of self-protection in time of war, or for the prevention of frauds on the revenue, exercise an authority beyond this limit. We have no doubt that the British Crown will claim the ownership of the soil in the bays and the open sea adjacent to the coast of Great Britain to at least the extent whenever there is any occasion to determine the ownership. The authorities are collected in Gould on Waters, Part I. cc. 1, 2, and notes. See also *Neill v. Duke of Devonshire*, 8 App. Cas. 135; *Gammell v. Commissioners of Woods and Forests*, 3 Macq. 419; *Mowat v. McFee*, 5 Sup. Ct. of Canada, 66; *The Queen v. Cubitt*, 22 Q. B. 622; *St. 46 & 47 Vict. c. 22.*"

*Commonwealth v. Manchester* (1890), 152 Mass. 230. Affirmed in *Manchester v. Massachusetts*, 139 U. S. 240.

#### 9. DETERMINATION OF BOUNDARIES.

##### (1). POLITICAL QUESTIONS.

#### § 154.

In a controversy between the United States and a foreign nation as to boundary, the courts will follow the decision of those Departments of the Government to which the assertion of its interest against foreign powers is confided, *i. e.*, the legislative and executive.

*Foster v. Neilson*, 2 Pet. 253; *Garcia v. Lee*, 12 Pet. 511; *Williamson v. Suffolk Ins. Co.*, 13 Pet. 415; *United States v. Reynes*, 9 Howard, 1.

To an application for a writ of prohibition to restrain the United States district court in Alaska from enforcing a sentence of forfeiture of a British vessel for taking seals unlawfully in the waters of Bering Sea (*In re Cooper*, 138 U. S. 404), it was objected that, as the allegation of want of jurisdiction in the district court was based on the alleged lack of jurisdiction of the United States at the place of seizure, which was fifty-seven miles from any land, and as this question of the jurisdiction of the United States was then a subject of controversy with Great Britain, the judiciary must follow the action of any political department of the Government or, at any rate, refrain from a decision upon the question pending its political determination. For the petitioner it was urged that, even assuming that the Executive might alone bind the courts in respect of the sovereignty of foreign territory, the changes in foreign governments, the existence of civil war in a foreign country, and the character of a foreign minister, the Executive, without the clear authority of an act of Congress, could never, by determining a so-called political question or by construing an act of Congress or a treaty, conclude the right

persons or property under the Constitution and laws of the United States or conclude the courts of the United States in a determination of these rights (*Little v. Barreme*, 2 Cranch, 170, 177; *United States v. Rauscher*, 119 U. S. 407, 418); and it was argued that Congress, in passing the act of March 2, 1889, in relation to the seals in Bering Sea, deliberately declined to determine the question of the extent of the dominion of the United States in that sea. In response to these arguments the court said that it did not appear by the act in question that Congress had "invited" the judicial branch of the Government to determine that question; but that there was, on the contrary, much force in the position that the passage of the act, with full knowledge of the previous executive action and of the diplomatic situation, justified the President in the conclusion that it was his duty "to adhere to the construction already insisted upon as to the extent of the dominion of the United States, and to continue to act accordingly. If this be so," continued the court, "the application calls upon the court, while negotiations are pending, to decide whether the Government is right or wrong, and to review the action of the political departments upon the question contrary to the settled law in that regard. *Foster v. Neilson*, 2 Pet. 253; *Williams v. Suffolk Ins. Co.*, 3 Sumner, 270; S. C. on certificate of division, 13 Pet. 415; *Luther v. Borden*, 7 How. 1; *Georgia v. Stanton*, 6 Wall. 50; *Jones v. United States*, 137 U. S. 202; *Nabob of Carnatic v. East India Company*, 1 Ves. Jr. 371; S. C., 2 Ves. Jr. 56; *Barclay v. Russell*, 3 Ves. Jr. 424; *Penn. v. Baltimore*, 1 Ves. Sr. 444 . . .

"We are not to be understood, however, as underrating the weight of the argument that in a case involving private rights, the court may be obliged, if those rights are dependent upon the construction of acts of Congress or of a treaty, and the case turns upon a question, public in its nature, which has not been determined by the political departments in the form of a law specifically settling it, or authorizing the Executive to do so, to render judgment, 'since we have no more right to decline the jurisdiction which is given than to usurp that which is not given.'

"But we need not go further in this direction, as our decision rests upon narrower grounds."

In re *Cooper* (1892), 143 U. S. 472, 502-505. The court then decided that as, upon the face of the libel, the facts found, and the final decree, none of which disclosed the exact place of the seizure, the district court clearly had jurisdiction, the writ of prohibition should not issue. The observations of the court, therefore, on the political question, though suggestive, were not material to the decision actually made.

"Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial but a political question, the determination of which by the



legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances *Gelston v. Hoyt*, 3 Wheat. 246, 324; *United States v. Palmer*, 3 Wheat. 610; *The Divina Pastora*, 4 Wheat. 52; *Foster v. Neilson*, 2 Pet. 253, 307, 309; *Keane v. McDonough*, 8 Pet. 308; *Garcia v. Lee*, 12 Pet. 511, 520; *Williams v. Suffolk Ins. Co.*, 13 Pet. 415; *United States v. Yorba*, 1 Wall. 412, 423; *United States v. Lynde*, 11 Wall. 632, 638. It is equally well settled in England. *The Pelican*, Edw. Adm. appx. D; *Taylor v. Barclay*, 2 Sim. 213; *Emperor of Austria v. Day*, 3 DeG., F. & J. 217, 221, 233; *Republic of Peru v. Peruvian Guano Co.*, 36 Ch. D. 489, 497; *Republic of Peru v. Dreyfus*, 38 Ch. D. 348, 356, 359."

*Jones v. United States* (1890), 137 U. S. 202, 212-213. Gray, J., delivering the opinion of the court.

"In *United States v. Arredondo* the court, referring to *Foster v. Neilson*, said: 'This court did not deem the settlement of boundaries a judicial but a political question—that it was not its duty *to leave but to follow* the action of the other departments of the Government. The same principles were recognized in *Cherokee Nation v. Georgia* and *Garcia v. Lee*. These authorities . . . relate to questions of boundary between independent nations.'"

*United States v. Texas* (1892), 143 U. S. 621, 639, discussing *Foster v. Neilson*, 2 Pet. 253, 307, 309; *Cherokee Nation v. Georgia*, 5 Pet. 21; *United States v. Arredondo*, 6 Pet. 691, 711; and *Garcia v. Lee*, 12 Pet. 511, 517.

"All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings. *United States v. Reynolds*, 9 How. 127; *Kennett v. Chambers*, 14 How. 38; *Hoyt v. Russell*, 117 U. S. 401, 404; *Coffee v. Grover*, 123 U. S. 1; *State v. Dunwell*, 3 R. I. 127; *State v. Wagner*, 61 Maine, 178; *Taylor v. Barclay*, and *Emperor of Austria v. Day*, above cited; 1 Greenl. Ev. section 6."

*Jones v. United States* (1890), 137 U. S. 202, 214.

## (2) RIGHTS OF INDIVIDUALS.

### § 155.

By the compact settling the boundary between Virginia and Tennessee it was declared that all titles and claims to land derived from

either government in the disputed territory should remain as secure as if derived from the government within whose limits they fell under the settlement. Two contesting titles, derived from grant from Virginia, were set up to lands which fell in Tennessee. One of the parties brought an action of ejectment, in which he offered certain evidence. Objection was made to the evidence on the ground that it tended to establish only an equitable title, acquired previously to the grant, and that this was inadmissible because such a claim could not be asserted in an action of ejectment in Virginia. *Held*, that remedies in respect to real estate were governed by the *lex loci rei sitæ*; that there was nothing to show that the two States in question intended to vary this rule in cases within the compact: and that the acts of their legislatures, passed to give the compact effect, should be construed as relating only to the validity of titles, leaving the remedies to be regulated by the *lex fori*.

Robinson v. Campbell (1818), 3 Wheaton, 212.

It belongs to sovereignties to fix boundaries between their respective jurisdictions; and when fixed by compact, they become conclusive upon their citizens and bind their rights.

Poole v. Fleegeer, 11 Peters, 185.

Grants made by the Spanish authorities in territory which, upon the subsequent settlement of a disputed boundary line, was determined to belong to one of the United States, are void.

Robinson v. Minor, 10 Howard, 627.

"Suffice it to say, that the Government of the United States, ever since the acquisition of Louisiana, in its legislative, executive, and judicial departments, has always held in theory, and by repeated acts of Congress and judicial decisions asserted in practice, that the territory between the Perdido and the Iberville rightfully constituted a portion of the province of Louisiana, as ceded by France to the United States on the 30th of April, 1803; and that the treaty between His Catholic Majesty and the United States, of the 22d February, 1819, has, in no respect whatever, strengthened the claims of Spanish grantees to lands embraced within these limits. This being the fact, it therefore follows, as a necessary consequence, that the grant by the Spanish intendant, Morales, of land within this territory, on the 24th March, 1804, having been made after the date of the Louisiana treaty, was without authority and is void."

Mr. Buchanan, Sec. of State, to Mr. Calderon de la Barca, July 27, 1847.  
MS. Notes to Spain, VI. 155.

By Art. IV. of the Webster-Ashburton treaty of Aug. 9, 1842, grants of land made by either party in the territory divided by the treaty were

confirmed, as well as "all equitable possessory claims, arising from a possession and improvement of any lot or parcel of land by the person actually in possession, or by those under whom such person claims, for more than six years before the date of this treaty."

(3) ACCRETION.

§ 156.

When a river is the line of *arcifinious* boundary between two nations, by a treaty, its natural channel so continues, notwithstanding any changes of its course by accretion or decretion of either bank; but if the course be changed abruptly into a new bed by irruption or avulsion, then the river bed becomes the boundary.

Cushing, At.-Gen. (1856), 8 Op. 175. See, also, *St. Louis v. Rutz* (1891), 138 U. S. 226. See, further, as to accretion, *supra*, § 82, pp. 270-273, and particularly *Nebraska v. Iowa* (1892), *supra*, § 82, pp. 272-273.

As to dependent islands formed by accretion, and the measurement of territorial waters therefrom, see the case of the *Anna* (1805), 5 C. Rob. 373, *supra*, § 82.

By the convention between the United States and Mexico, of November 12, 1884, it is provided that the dividing line between the two countries, in the Rio Grande and Rio Colorado, shall, in conformity with prior treaties, forever "follow the center of the normal channel of the rivers named, notwithstanding any alterations in the banks or in the course of those rivers, provided that such alterations be effected by natural causes through the slow and gradual erosion and deposit of alluvium and not by the abandonment of an existing river bed and the opening of a new one." (Art. I.)

"Any other change, wrought by the force of the current, whether by the cutting of a new bed, or when there is more than one channel by the deepening of another channel than that which marked the boundary at the time of the surveys made under the aforesaid treaty [of Guadalupe Hidalgo, February 2, 1848], shall produce no change in the dividing line as fixed by the surveys of the International Boundary Commissions in 1852, but the line then fixed shall continue to follow the middle of the original channel bed, even though this should become wholly dry or be obstructed by deposits." (Art. II.)

(4) PRESCRIPTION.

§ 157.

The legislature of Virginia, in 1800, and the legislature of Tennessee, in 1801, passed acts to authorize the appointment of commissioners to determine the boundary line between the two States. In January, 1803, the commissioners made a report, which was adopted by the respective legislatures of the two States. In 1856, fifty-four

years after the line was settled, Virginia passed an act reciting that the line as marked by the commissioners in 1802 had from lapse of time and other causes become indistinct, and authorizing the appointment of commissioners to cooperate with commissioners of Tennessee in running and marking the line again. Commissioners were appointed by both States, and their re-marking of the line was approved by the legislature of Tennessee. Virginia withheld her approval and asked for the appointment of new commissioners to re-run and re-mark the line, but no complaint was made as to the correctness of the line run and established in 1802, nor was any complaint made by her in that regard until within a recent period. At length Virginia filed a petition in the Supreme Court asking that the compact between the two States, under their legislation of 1803, be declared null and void, as having been entered into without the consent of Congress, and praying that the court proceed to establish the true boundary line. The court held that, by acts of Congress passed subsequently to 1803, the compact of that year had been impliedly consented to and approved; but the court also said:

“Independently of any effect due to the compact as such, a boundary line between states or provinces, as between private persons, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant; and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary. *Lord Hardwicke*, in *Penn v. Lord Baltimore*, 1 Vesey Sen. 444, 448; *Boyd v. Graves*, 4 Wheat. 513; *Rhode Island v. Massachusetts*, 12 Pet. 657, 734; *United States v. Stone*, 2 Wall. 525, 537; *Kellogg v. Smith*, 7 Cush. 375, 382; *Chenery v. Waltham*, 8 Cush. 327; *Hunt on Boundaries*, (3d. ed.) 306.

“As said by this court in the recent case of the *State of Indiana v. Kentucky*, (136 U. S. 479, 510,) ‘it is a principle of public law, universally recognized, that long acquiescence in the possession of territory, and in the exercise of dominion and sovereignty over it, is conclusive of the nation’s title and rightful authority.’ In the case of *Rhode Island v. Massachusetts*, 4 How. 591, 639, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies said: ‘Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of

individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary.'

"Vattel, in his Law of Nations, speaking on this subject, says: 'The tranquility of the people, the safety of states, the happiness of the human race do not allow that the possessions, empire, and other rights of nations should remain uncertain, subject to dispute and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title.' (Book II., c. 11, sec. 149.) And Wheaton, in his International Law, says: 'The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called *prescription*, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one state excludes the claim of every other in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question.' (Part II., c. 4, sec. 164.)

"There are also moral considerations which should prevent any disturbance of long recognized boundary lines; considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachments to country, to home and to family, on which is based all that is dearest and most valuable in life."

*Virginia v. Tennessee* (1893), 148 U. S. 503.

April 30, 1900, a decree was entered ordering the appointment of commissioners to ascertain, re-trace, re-mark, and reestablish the boundary line between the States of Virginia and Tennessee, as established by the decree in *Virginia v. Tennessee*, 148 U. S. 503, but without authority to run or establish any other or new line. (*Tennessee v. Virginia* (1900), 177 U. S. 501.)

### III. BOUNDARIES OF THE UNITED STATES.

#### 1. WITH THE BRITISH POSSESSIONS.

#### § 158.

The history of the settlement of the boundary between the United States and the British possessions in America is given in Moore's History and Digest of International Arbitrations, as follows:

The St. Croix River, I. c. i. 1-43.

Islands in the Bay of Fundy, I. c. ii. 45-63.

The Northeastern Boundary, I. c. iii. 65-83; c. iv. 85-161.

Boundary through the River St. Lawrence, and Lakes Ontario, Erie, and Huron, I. c. v. 162-170; VI., maps.

Boundary from Lake Huron to the most northwestern point of the Lake of the Woods, I. c. vi. 171-195; VI., maps.

San Juan Water Boundary, I. c. vii. 196-235.

As to the Alaskan boundary, see *supra*, § 107, pp. 466-475; and for the final award, Oct. 20, 1903, For. Rel. 1903, 543.

Though the ownership of the islands in the Bay of Fundy was determined in 1817,<sup>a</sup> no step was taken to mark the water boundary in that quarter till 1891. July 22, 1892, a treaty was concluded between the United States and Great Britain, by Article II. of which the high contracting parties agreed to appoint two commissioners, one to be named by each party "to determine upon a method of more accurately marking the boundary line between the two countries in the waters of Passamaquoddy Bay in front of and adjacent to Eastport, in the State of Maine, and to place buoys or fix such other boundary marks as they may determine to be necessary." President Cleveland, in his annual message of December 2, 1895, said: "The commissioners appointed to mark the international boundary in Passamaquoddy Bay according to the description of the treaty of Ghent have not yet fully agreed."

"Having carefully considered and examined . . . the subject, I feel no hesitancy in stating that, by the terms of the second article of the treaty of 9th August, 1842, between the United States and Her Britannic Majesty, Jona's or Squirrel Island is a British possession, and that the United States have no right or claim to jurisdiction over the same."

Mr. Buchanan, Sec. of State, to Mr. Pakenham, Brit. min., Dec. 26, 1846, MS. Notes to Gr. Britain, VII. 149.

As to the floating light at Lime Kiln Crossing, Detroit River, see Mr. Frelinghuysen, Sec. of State, to Mr. West, Brit. min., Dec. 23, 1884, MS. Notes to Gr. Br. XIX. 609.

In the President's annual message of December 2, 1895, attention was also called "to the unsatisfactory delimitation of the respective jurisdictions of the United States and the Dominion of Canada in the Great Lakes at the approaches to the narrow waters that connect them." The waters in question, it was said, were frequented by fishermen of both nationalities, and owing to the uncertainty and ignorance as to the true boundary, vexatious disputes and injurious seizures of boats and nets by Canadian cruisers had often occurred, while any settlement of such cases by an accepted standard was not easily to be reached. A joint commission to determine the line in those quarters, on a practical basis, by measured courses following range marks on

<sup>a</sup> Moore, *Int. Arbitrations*, I. 62-63.

shore was declared to be "a necessity for which immediate provision should be made."

While the line from the river St. Lawrence to the most northwestern point of the Lake of the Woods was settled by the treaty of Ghent and the commissions thereunder, and by the Webster-Ashburton treaty, it should be observed that there has been no joint survey of the line from Pigeon River to the Lake of the Woods.<sup>a</sup> In consequence of this defect, questions have at times arisen as to the precise extent of jurisdiction.

A question as to the nationality of Coleman and Hunters islands, in Lac La Croix, under Article II. of the Webster-Ashburton treaty, gave rise to a correspondence in 1895. The line therein described "is distinct to Ile Royale on the western shore of Lake Superior, but from this point to the Lake of the Woods the description is not sufficiently minute to designate the exact boundary through the tortuous water communication, which presents a chain of lakes and rivers filled with numerous islands." The United States declared that not only was the position of Coleman Island well to the south of any natural boundary passing through the waters of Lac La Croix (otherwise called Nequowquon), but that by continued occupation and governmental survey a presumption of title on the part of the United States had been established, "not to be set aside save upon the most absolute proof to the contrary." Reference was also made to the fact that, although no chart of that portion of the boundary had ever been made by the two Governments jointly, the British commissioner, under Article VII. of the treaty of Ghent, had traced on a map, filed October 23, 1826, by James Ferguson, American principal surveyor to the commission, a tentative line of demarcation through the waters and islands of Lac La Croix, and that Hunters and Coleman islands appear designated by the numbers 25 and 27 to the south of the British commissioner's proposed line. The United States therefore proposed that the two Governments endeavor to reach an exact agreement for the precise marking of the boundary in question, "in accordance with the true intent of the contracting parties expressed in the treaty of 1842, and having due regard to the prescriptive rights of undisputed occupation within the reasonable limits of such boundary."<sup>b</sup>

October 17, 1895. Mr. Olney, Secretary of State, wrote to Sir Julian Pauncefote, British ambassador, stating that representations

<sup>a</sup> H. Report 1310, 54 Cong. 1 sess.; Moore, *Int. Arbitrations*, I. 236.

<sup>b</sup> Mr. Uhl, Acting Sec. of State, to Lord Gough, British chargé, July 3, 1895, *For. Rel.* 1895, I. 702. In Mr. Uhl's note reference is made to a series of maps published by the ordnance survey office at Southampton in 1868, reproducing the original maps filed before the commission under the treaty of Ghent. When these reproductions were made, the duplicate originals belonging to the United States were supposed to have been lost. These originals, however, have since been found and are now in the Department of State.

had been made to the United States that the department of marine and fisheries of Canada was taking steps to secure evidence as to the channel in the Lake of the Woods around Oak Island, with the intention of claiming that island. Mr. Olney referred to the fact that Article II. of the Webster-Ashburton treaty described the boundary in the Lake of the Woods as running from "that point in Lac la Pluie, or Rainy Lake, at the Chaudière Falls, from which the commissioners traced the line to the most northwestern point of the Lake of Woods." He stated that on the original signed map prepared by the commissioner under Article VII. of the treaty of Ghent, Oak Island, which was marked No. 1, was designated as belonging to the United States; that its American character and occupancy had not admitted of any doubt, and that the reported action of the Canadian authorities in extending their surveys to the westward of the island was therefore an intrusion upon the territory of the United States which had disquieted the occupants and was likely to give rise to conflicts.<sup>a</sup>

The Canadian government replied that the information which had reached the Department of State at Washington as to the reported action of the department of marine and fisheries was entirely without foundation, no survey of the kind having been undertaken, but that the report might have resulted from the issuance of fishing licenses in the Lake of the Woods. It had been claimed by certain parties, and supported by the opinion of a number of old settlers, that the boundary line followed the steamboat channel, which was south of Oak Island, and inquiries were at the same time made as to the identity of the island laid down as No. 1 on the boundary map with that commonly known as Oak Island. "Beyond the authoritative establishment of the boundary as laid down in the conventions cited by Mr. Secretary Olney, and of the identity of the island designated as No. 1, the department of marine and fisheries has," concluded the Canadian reply, "had no concern whatever; neither has it in any way suggested an expansion of territory or jurisdiction beyond that conventionally conferred upon the Crown."<sup>b</sup>

By the act of Congress of March 19, 1872, the President was authorized to cooperate with the Government of Great Britain in the appointment of a joint commission to survey and mark the boundary between the United States and the British possessions from the Lake of the Woods to the summit of the Rocky Mountains. The labors of the commission were concluded in 1876. The final records and maps were signed in London on the 29th of May in that year, and a protocol was drawn up and signed setting forth the commission's final proceedings.<sup>c</sup>

<sup>a</sup> For. Rel. 1895, I. 724.

<sup>b</sup> For. Rel. 1895, I. 725-726.

<sup>c</sup> Moore, Int. Arbitrations, I. 235-236; S. Ex. Doc. 41, 44 Cong. 2 sess.



The line from the Rocky Mountains to the Gulf of Georgia, under the treaty of 1846, was surveyed and marked by commissioners prior to 1870. On the 24th of February in that year Mr. Fish, Secretary of State, and Mr. Thornton, British minister, signed a protocol declaring that seven maps, which were duly certified and authenticated under the signatures of the American and British commissioners and on which the boundary in question was traced, were approved, agreed to, and adopted by both Governments.<sup>a</sup> When the survey was made, however, many places along the frontier were uninhabited and virtually inaccessible which have since attracted a considerable number of settlers, and proposals have been discussed for the restoration of the original monuments, where these were defective, and for the erection of supplementary ones.<sup>b</sup>

"Provision should be made for a joint demarcation of the frontier line between Canada and the United States, wherever required by the increasing border settlements, and especially for the exact location of the water boundary in the straits and rivers." (President Harrison, Dec. 9, 1891, annual message.)

For information as to the topography of the country along the border and the extent to which recognizable boundary marks exist, see Bulletin No. 174 of the U. S. Geological Survey.

"A more complete marking of parts of the boundary" between the United States and the British possessions was one of the subjects referred to the Joint High Commission of 1898-99, whose labors were suspended in consequence of differences as to the Alaskan boundary.<sup>c</sup>

## 2. WITH MEXICO.

### (1) LAND LINES.

#### § 159.

[See *supra*, §§ 103, 105, 106.]

By the treaty of limits of January 12, 1828, the United States and Mexico engaged each to appoint a commissioner and a surveyor to run the line, and they also agreed to accept the result reached by them.

<sup>a</sup> Treaties and Conventions of the United States, 1776-1887, p. 440.

<sup>b</sup> Mr. Hay, Sec. of State, to Sec. of Treasury, Jan. 28, 1901, 250 MS. Dom. Let. 431, enclosing copy of a note from the British ambassador of Jan. 14, 1901; Mr. Hay, Sec. of State, to Mr. Foster, M. C., Jan. 29, 1901, 250 MS. Dom. Let. 441; Mr. Hay, Sec. of State, to Sec. of Interior, Jan. 30, 1901, 250 MS. Dom. Let. 463.

<sup>c</sup> President McKinley, annual message, Dec. 5, 1899. See report of Senator Clark, of Wyoming, from the Com. on For. Rel., Feb. 23, 1900, on a joint resolution (S. R. 71) authorizing the President to invite Great Britain to join in creating an international commission to examine and report on the diversion of the waters that form the boundary between the two countries. (S. Rep. 461, 56 Cong. 1 sess.)

There was no provision for the decision of questions of difference, if any, between the persons so appointed. A similar engagement was incorporated in the 5th article of the treaty of Guadalupe Hidalgo of Feb. 2, 1848, and in the first article of the treaty of December 30, 1853, both of which made cessions of territory to the United States and established a new boundary. Prior to the conclusion of the latter treaty, a question arose as to a certain tract of territory claimed by the United States as part of New Mexico, and as having passed to the United States under the treaty of 1848, while Mexico alleged that it formerly belonged to the State of Chihuahua.

“Where a dispute as to territorial limits arises between two nations, the ordinary course is to leave the territory claimed by them, respectively, in the same condition (or as nearly so as possible), in which it was when the difficulty first occurred until an amicable arrangement can be made in regard to conflicting pretensions to it. It has not been the intention of the United States to deviate from this course, nor has any notice been given by Mexico that she proposed to assume jurisdiction over it, or change the possession as it was held at the conclusion of the treaty of peace and limits [1848] between the two Republics.

“Governor Lane [of New Mexico] is justified in claiming the disputed territory as a part of New Mexico and in denying that the acts of the boundary commission had in any manner effected a transfer of that territory from New Mexico to Chihuahua, but his proceeding to enter the territory and hold it by force of arms is not approved and will not be, unless it shall appear that the authorities of Chihuahua had changed or were attempting to change the state of things in the disputed territory from the condition in which they were before the action of the boundary commission on that part of the line. The successor to Governor Lane will proceed without delay to New Mexico with instructions to pursue a course fair towards Mexico and usual in such cases.

“You are instructed to assure the Government of Mexico of the willingness of the Government of the United States to have the territory remain as it was when the treaty of Guadalupe Hidalgo was concluded, without prejudice to the rights of either party, until the line shall be definitely settled by the boundary commission or by negotiation.”

Mr. Marcy, Sec. of State, to Mr. Conkling, min. to Mexico, May 18, 1853.  
MS. Inst. Mex. XVI. 376.

In reply to a request for “certified copies of the data, surveys, and reports relating to the Emory-Salazar line between the United States and Mexico, to settle a controversy as to the boundary of certain lands

lying in El Paso County, Texas," the Department of State said: "This Department is the custodian of the maps of the survey in question, which are accompanied by the original field notes. Neither the maps nor the field notes have ever been printed." It was added that every facility would be afforded for their examination by a properly accredited expert.

Mr. Ades, Acting Sec. of State, to Mr. Smith, Aug. 18, 1890, 230 MS. Dom. Let. 387.

For letters and papers relating to the boundary with Mexico, see Ex. Doc. 6, 33 Cong. special sess.

For the report of Maj. W. H. Emory, U. S. commissioner, on the survey of the boundary, including a general description of the country and maps and illustrations, see H. Ex. Doc. 135, 34 Cong. 1 sess. Vol. XIV. in 3 parts.

By a convention of July 29, 1882, the United States and Mexico agreed to create an international boundary commission, consisting of a chief engineer and associates appointed by each party, to relocate the boundary in places where the monuments of prior surveys had been destroyed or displaced. This convention having lapsed by reason of delays in the appointment of commissioners, President Cleveland, in his annual message of December 3, 1888, said: "The precise relocation of our boundary line [with Mexico] is needful, and adequate appropriation is now recommended." The convention of 1882 was revived by a convention of February 18, 1889, by which the time for the execution of the work was fixed at five years from the date of the exchange of the ratifications of the new convention. Continuances were subsequently effected till October 11, 1894, and October 11, 1896.

"The commissioners on the part of the United States who were appointed pursuant to the convention of July 29, 1882, as subsequently revived and continued to October 11, 1896, in regard to the survey and re-marking of the boundary line between the United States and Mexico, have completed their work and made their final report. An early opportunity will be taken to lay the matter before Congress, to the end that this valuable report, with its accompanying maps and views, may be printed."

Report of Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxviii. See also President Cleveland, annual message, Dec. 2, 1895. The report, maps, and views were subsequently printed.

In deference to the expressed wishes of the Mexican Government, the United States authorities in Arizona were directed in 1887 to suspend further action in the matter of the survey of certain realty, and all proceedings in connection therewith, it being alleged that the land lay in Mexico, pending the definite relocation of the boundary line pursuant to the treaty of July 29, 1882. (For. Rel. 1887, 873-881.)

See a discussion as to the disputed piece of land called Banco Cuauhtemoc or Banco Vela. The matter was submitted to the International Boundary Commission. (For. Rel. 1894, 391-394.)

For correspondence in relation to the proceedings of the commission, see For. Rel. 1894, 411, 415.

"The International Boundary Commission of Mexico and the United States, created by the convention of July 29, 1882, to replace the monuments marking the dividing line from Paso del Norte to the Pacific Ocean, noticed in the execution of its labors considerable differences between the dividing line agreed upon in the treaty of December 30, 1853, and that laid off on the spot by the respective commissions which were at work up to the year 1856, especially in the measurement of 100 miles along parallel  $31^{\circ} 47'$  north latitude, from the river Bravo west, and thence south until striking parallel  $31^{\circ} 20'$ , and following that parallel to the west to the meridian  $111^{\circ}$  west of Greenwich. The progress of science, the perfection of scientific instruments, and the use of the telegraph enabled this commission to discover the mistakes of the first.

"As it is proper that the demarcation of the dividing line on the ground should be in conformity with the provisions of the treaty in question, the Mexican Government thinks that the line should be rectified so as to agree with the treaty which fixed it, and to prevent either of the contracting countries being in possession, although by mistake, of portions of territory which it was not the intention of the treaty to grant it.

"To this end the Mexican Government has instructed me to propose to the United States Government the conclusion of a new convention to rectify the demarcation of the dividing line in accordance with the treaty of 1853, between the river Bravo (monument No. 1) and the Colorado River (monument No. 205), or throughout its whole extent, if the United States Government should prefer to have the rectification made along the whole line, although the differences found in the dividing line between the Californias are insignificant.

"If the United States Government considers these observations well founded, and if you desire it, I will draw up a draft of a convention for the exact demarcation of the dividing line throughout its whole extent, or in the part mentioned."

Mr. Romero, Mex. min., to Mr. Sherman, Sec. of State, Aug. 9, 1897, For. Rel. 1897, 398. The errors discovered in the survey of 1856 were as follows:

1. A mistake in the measurement of the section along parallel  $31^{\circ} 47'$ , west from the Rio Grande. This distance was found to be 159,193.4 meters instead of 160,933.0 meters (100 miles), as prescribed by the treaty. As a result of this error the meridian section connecting the parallel of  $31^{\circ} 47'$  with the parallel of  $31^{\circ} 20'$  was located approximately one mile (1,739.6 meters) east of its proper position, thus giving to the

United States a strip of land about 31 miles long from north to south by about a mile in width.

2. The longitude of the monument marking the western terminus section along parallel  $31^{\circ} 20'$ , which should have been at the 111th meridian, was found to be in longitude  $111^{\circ} 4' 34.45''$ , or about  $4\frac{1}{2}$  miles west of its proper position. This error also was favorable to the United States, giving it a nearly triangular area of about 290 square miles.

The sum of both errors was therefore about 320 square miles.

As a whole the work of the commission of 1853-56 was found to be correct. Indeed, the final difference in longitude between the Atlantic and the Pacific coast as determined by that commission differed from that determined by the later one, by the more recent and more precise methods, by only about 1.6 miles.

"As to the question of a new convention for the rectification of the boundary in accordance with the treaty of December, 1853, I make no recommendation in all candor, in which the interests of both Governments are considered in forming a conclusion, that it is one of propriety. . .

"Article I. of the treaty of December, 1853, states:

"That line shall be alone established upon which the commission may fix, their consent in this particular being considered decisive as an integral part of this treaty, without necessity of ulterior ratification or approval, and without room for interpretation of any kind on either of the parties contracting.

"The dividing line thus established shall, in all time, be faithfully respected by the two Governments without any variation thereof unless of the express and free consent of the two, given in conformity to the principles of the law of nations, and in accordance with the constitution of each country, respectively."

"Great stress seems to have been laid upon the importance of a permanent and permanent settlement of the boundary which shall in all time be faithfully respected by the two Governments. . . .

"The delimitation by that commission was made an explicit part of the treaty, and it would seem that the line thus established should not be changed except for very weighty and serious reasons. It is questionable if the transfer of a comparatively few square miles of land then practically valueless, and now of but small intrinsic worth, could be considered a sufficient reason to disturb the satisfactory condition that exists on the frontier and give occasion for all sorts of pretexts for claims for damages on the part of the owners of adjacent lands."

"It would seem, in the Department's judgment, that all the provisions of the several treaties have been subserved; a boundary has been established and marked, in compliance with the treaty of 1853, has been known and accepted by both Governments as well as by the people living along the border. It is true this line may perhaps have been inadequately marked at first, and several of the marks may

disappeared, but its approximate location was recognized, and private rights were acquired in accordance with its location. In compliance with the treaties of 1882 and 1889 this boundary was reestablished and carefully marked, and, as such, is apparently satisfactory to the people in its vicinity. The monuments as now located are permanent and intervisible; no dispute can arise in regard to the boundary, which is practically the same that has been known and recognized during the preceding forty years. It would seem, therefore, a useless refinement to change it now. The matter at issue, so far as the two Governments are concerned, it is respectfully submitted, is but a trifle, while to the individuals to be affected the results of a change might be very serious.

"While the work proposed, should it ultimately be determined to make the rectification referred to, would not be specially difficult and would involve no very intricate scientific problems, yet the more serious and expensive part of it would doubtless be the removal and reerection of all monuments along the meridian section, 14 in number, three being of stone; also those on the azimuth line from the one hundred and eleventh meridian to the Colorado River, 80 in number, 10 being of stone. . . .

"In this connection, it is well to bear in mind that all surveys, even when carried out with the greatest precision, are necessarily approximate. There is therefore no reason to believe that the survey of the commission of 1891-1895 was infallible, or that should the line be now changed to conform to its results a future generation would be equally justified in changing it again on the plea that a further advance in scientific methods had discovered errors in the present work.

"I submit these views for the information of the Mexican Government. In the President's judgment no sufficient reasons have been adduced why either Government should be put to the expense of endeavoring to rectify a line, that future generations may be able to say is not the true one, after it has been so thoroughly and competently surveyed, in the light of all modern and scientific methods, by the joint commission organized pursuant to the convention of July 29, 1882. The results of that commission should stand, since the differences indicated are of practically no intrinsic value so far as the few square miles of land are concerned, and the boundary line so marked is practically the same that had been known and recognized during the preceding forty years."

Mr. Sherman, Sec. of State, to Mr. Romero, Mex. min., Sept. 22, 1897, For. Rel. 1897, 390.

Mr. Romero, Sept. 23, 1897, acknowledged the receipt of the foregoing note, and stated that he would send a copy of it to his Government. (For. Rel. 1897, 402.)

See, also, Mr. Cridler, Third Assist. Sec. of State, to Mr. Barlow, Sept. 23, 1897, 221 MS. Dom. Let. 134.

## (2) WATER LINES.

## § 160.

In 1884 a discussion took place between the United States and Mexico in regard to the ownership of two islands, called by Mexico Morteritos and Sabinitos, in the Rio Grande. Mexico claimed the islands as Nos. 12 and 13 in the printed report of Maj. William H. Emory, chief of the United States boundary commission, under the treaty of Guadalupe Hidalgo. The United States found, on examination of the original surveys, that the printed report was, by reason of a typographical mistake, erroneous; that the island of Sabinitos was numbered 14 in the original surveys and assigned to Mexico; that island No. 12 was called Green Key Island and also was assigned to Mexico; but that island No. 13 comprised twin islands called the Beaver Islands, the larger of which was known by the Mexicans as Morteritos, and that these islands were assigned by the commissioners to the United States. The United States therefore declared that the record required that it should "regard its territorial jurisdiction over the island of Morteritos, otherwise Beaver Island (No. 13), as established by the boundary commission under the treaty of Guadalupe Hidalgo, and consequently that the Mexican pretension to that island and to accretions thereto from the left or United States bank of the Rio Grande shall be denied."

The Mexican Government, subsequently admitting the confusion in names, stated that it had "decided not to insist upon the rights of Mexico over the island of Morteritos in the supposition that it is island No. 13, or Beaver Island," and added:

"The bases of this decision rest upon the stipulations of the fifth article of the treaty of Guadalupe Hidalgo of February 2, 1848, that the dividing line between our two countries from the Gulf of Mexico to Paso del Norte should be the center of the Rio Grande, and that where this river had more than one channel the line should follow the deepest. This circumstance being borne in mind by the boundary commission in laying down the line, the channel which lay to the south of island No. 13, or Morteritos, or Beaver Island, left this island upon the side of the United States.

"As this is the basis presented by the Government of the United States to defend its rights to that island, it thus recognizes that the limits between the two Republics are those fixed by the treaty of Guadalupe Hidalgo, such as were laid down by the mixed commission, without having been altered by the changes occasioned by the current of the river, whether in its margins or the deepest of its channels."

Mr. Romero, Mex. min., to Mr. Frelinghuysen, Sec. of State, May 24, June 2, and June 12, 1884; Mr. Frelinghuysen, Sec. of State, to Mr. Romero, Mex. min., July 10, 1884; Mr. Frelinghuysen, Sec. of State, to Mr. Morgan, min. to Mex., July 11, 1884; Mr. Morgan, min. to Mex., to Mr. Frelinghuysen, Sec. of State, Aug. 12, 1884; Mr. Romero, Mex. min., to Mr. Frelinghuysen, Sec. of State, Oct. 9, 1884; *For. Rel.* 1884, 380-382, 393, 373, 375, 396.

"It has been held in this Department that when, through the changing of the channel of the Rio Grande, the distance of an island in the river from the respective shores has been changed, the line adjusted by the commissioners under the treaty [of Guadalupe-Hidalgo] is nevertheless to remain as originally drawn." (Mr. Bayard, Sec. of State, to Mr. Bowen, June 12, 1886, 160 MS. Dom. Let. 162.)

"Whereas, in virtue of the Vth article of the Treaty of Guadalupe Hidalgo between the United States of America and the United States of Mexico, concluded February 2, 1848, and of the first Article of that of December 30, 1853, certain parts of the dividing line between the two countries follow the middle of the channel of the Rio Grande and the Rio Colorado, to avoid difficulties which may arise through the changes of channel to which those rivers are subject through the operation of natural forces, the Government of the United States of America and the Government of the United States of Mexico have resolved to conclude a convention which shall lay down rules for the determination of such questions. . . .

"ARTICLE I. The dividing line shall forever be that described in the aforesaid Treaty and follow the center of the normal channel of the rivers named, notwithstanding any alteration in the banks or in the course of those rivers, provided that such alterations be effected by natural causes through the slow and gradual erosion and deposit of alluvium and not by the abandonment of an existing river bed and the opening of a new one.

"ARTICLE II. Any other change, wrought by the force of the current, whether by the cutting of a new bed, or when there is more than one channel by the deepening of another channel than that which marked the boundary at the time of the survey made under the aforesaid Treaty, shall produce no change in the dividing line as fixed by the surveys of the International Boundary Commissions in 1852, but the line then fixed shall continue to follow the middle of the original channel bed, even though this should become wholly dry or be obstructed by deposits.

"ARTICLE III. No artificial change in the navigable course of the river, by building jetties, piers, or obstructions which may tend to deflect the current or produce deposits of alluvium, or by dredging to deepen another than the original channel under the Treaty when there is more than one channel, or by cutting waterways to shorten the navigable distance, shall be permitted to affect or alter the divid-



ing line as determined by the aforesaid Commissions in 1852 or as determined by Article I. hereof and under the reservation therein contained; but the protection of the banks on either side from erosion by revetments of stone or other material not unduly projecting into the current of the river shall not be deemed an artificial change.

"ARTICLE IV. If any international bridge have been or shall be built across either of the rivers named, the point on such bridge exactly over the middle of the main channel as herein determined shall be marked by a suitable monument, which shall denote the dividing line for all the purposes of such bridge, notwithstanding any change in the channel, which may thereafter supervene. But any rights other than in the bridge itself and in the ground on which it is built shall in event of any such subsequent change be determined in accordance with the general provisions of this convention.

"ARTICLE V. Rights of property in respect of lands which may have become separated through the creation of new channels as defined in Article II. hereof, shall not be affected thereby, but such lands shall continue to be under the jurisdiction of the country to which they previously belonged.

"In no case, however, shall this retained jurisdictional right affect or control the right of navigation common to the two countries under the stipulations of Article VII, of the aforesaid Treaty of Guadalupe Hidalgo; and such common right shall continue without prejudice through the actually navigable main channels of the said rivers, from the mouth of the Rio Grande to the point where the Rio Colorado ceases to be the international boundary, even though any part of the channel of said rivers, through the changes herein provided against, may be comprised within the territory of one of the two nations. . . . Done at the city of Washington, . . . this twelfth day of November, A. D. 1884.

"FREDK. T. FRELINGHUYSEN. [SEAL.]

"[SEAL.] M ROMERO."

While the foregoing convention settled general principles, questions inevitably arose as to their application in particular cases.

In 1888 representations were made to the Mexican Government, at the instance of the city of El Paso, Tex., in relation to certain wing-dams which the Mexican authorities were constructing at Ciudad Juarez, on the opposite shore of the Rio Grande, for the ostensible purpose of protecting the shore from erosion. Engineers were sent by the two Governments to consider the situation and confer upon it. After the close of their conferences, the United States, on receiving the report of its engineers, suggested that, "in view of the apparent subjection of the questions presented at Ciudad Juarez to the stipulations of the river-boundary convention of November 12, 1884, and of the

immediate prospect of a convenient forum for their adjustment being afforded as the result of the negotiation" then about to be concluded "for an international boundary commission," the work should be suspended, unless the complaint should be removed by a modification of the plans.

Mr. Bayard, Sec. of State, to Mr. Connery, chargé at Mexico, No. 258, Feb. 13, 1888, For. Rel. 1888, II. 1110 et seq., and 1241; Mr. Romero, Mex. min. to Mr. Bayard, Sec. of State, Nov. 12, 1888, For. Rel. 1889, 615; Mr. Bayard to Mr. Romero, Nov. 14 and 15, 1888, id. 616; Mr. Romero to Mr. Bayard, Dec. 6, 1888, id. 617; Mr. Bayard to Mr. Romero, March 1, 1889, id. 621. It is from the note of Mr. Bayard of March 1, 1889, that the quotations in the foregoing summary are made. The convention referred to below, was signed later in the day. For the first report of Major Ernst, the United States engineer, Dec. 12, 1888, see S. Ex. Doc. 144, 50 Cong. 2 sess. 43. See Mr. Sherman, Sec. of State to Mr. Romero, April 12, 1898, referring to an understanding for "the continuance of repairs upon heretofore authorized defensive facings on the Mexican bank [of the Rio Grande, at Ciudad Juarez], while prohibiting the building of new works [i. e., a new wing dam] in the river bed itself, not authorized by the commission." (MS. Notes to Mex. Leg. X. 388.)

By a convention concluded March 1, 1889, provision was made for the establishment of an international commission, commonly called the International Water Boundary Commission, which should have jurisdiction of questions arising under the convention of November 12, 1884. The commission thus provided for consists of two commissioners, one appointed by each Government, two consulting engineers appointed in the same manner, and such secretaries or interpreters as either Government may see fit to appoint. If the two commissioners agree, their decision is final unless either Government shall within a month from its rendition disapprove it. In case either Government shall disapprove it, both Governments engage to take cognizance of the matter and to decide it amicably, bearing constantly in mind the stipulations of Article XXI. of the treaty of Guadalupe Hidalgo in favor of arbitration where practicable. The two Governments also engage to proceed in the same manner in case the two commissioners disagree. It was provided that the convention should remain in force five years from the date of the exchange of ratifications. The ratifications were exchanged December 24, 1890. In his annual message of December 9, 1891, President Harrison stated that Mexico had named her members of the commission, and that an appropriation was "necessary to enable the United States to fulfill its treaty obligation in this respect." By a convention of October 1, 1895, the powers of the international commission were extended for a year from December 24, 1895, to enable the commission to "conclude the examination and decision of the cases sub-

mitted to it." Other extensions were subsequently provided for; and at length, by a convention signed November 21, 1900, the ratifications of which were exchanged on the 24th of the following month, the convention of March 1, 1889, was extended indefinitely.

"I have to acknowledge the receipt of your letter of the 3d instant, in which, as attorney for the El Paso and Northeastern Railroad Company, you complain that the United States and Mexican International (Water) Boundary Commission has recommended the removal of certain embankments and other obstructions made by the company in the construction of its road.

"You protest against the commission's action, and ask for a hearing before this Department on the ground:

"1. That the engineers have made a mistake as to the facts concerning the embankments and other structures; and

"2. That there is no warrant in the treaties or laws of the United States for such proceedings as seem to be contemplated in the action of the commissioners.

"The action of the commissioners was taken under the convention between the United States and Mexico of March 1, 1889, and the conventions continuing it in force. By Article VIII. of that convention, it is stipulated that if both commissioners shall agree to a decision their judgment shall be considered as binding upon both Governments, unless one of the Governments shall disapprove it within one month, reckoned from the day on which it shall have been pronounced. The decision of the commissioners on the matter to which you refer was duly pronounced on the 3rd of May, more than a month before the receipt of your letter; and, some days previously to the receipt of your letter, the decision was expressly approved.

"The Department would upon this ground alone be precluded from granting your request for a hearing; but it is proper to add that, if the decision had not already become operative under the convention, no ground has, in the opinion of this Department, been disclosed for its considering the question of setting aside the decision of the commissioners. As to the question of their legal authority, it is only necessary to advert to the circumstance, to which reference has already been made, that the proceedings of the commissioners were taken under a duly ratified treaty, which is, by the Constitution of the United States, a law of the land.

"As to questions of fact touching the embankments and other structures, this Government has pursued the only practicable course of acting upon the reports of representatives specially appointed for the purpose of informing it upon such matters."

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\* See For. Rel. 1897, 403-405.

Mr. Moore, Assist. Sec. of State, to Mr. McGowan, June 15, 1898, 229 MS. Dom. Letters, 351.

President McKinley, in his annual message of Dec. 5, 1898, stated that the commission had adjusted all the matters committed to it "to the satisfaction of both Governments," except (1) the case of the "Chualar," at El Paso, Texas, in which the commissioners failed to agree and in which the United States had suggested, for the particular instance, the addition of a third member; (2) "the proposed elimination of what are known as 'Bancos,' small isolated islands formed by the cutting off of bends in the Rio Grande, from the operation of the treaties of 1884 and 1889, recommended by the commissioners and approved by this Government, but still under consideration by Mexico;" and (3) "the subject of the 'Equitable Distribution of the Waters of the Rio Grande,' for which the commissioners recommended an international dam and reservoir, approved by Mexico, but still under consideration by this Government."

As to the four reports, dated June 30, 1897, in the case of bridges at Laredo and at Eagle Pass, Texas, jetties at Hidalgo, Texas, and defensive works at Brownsville, Texas, see Mr. Cridler, Third Assist. Sec. of State, to Gen. Mills, Oct. 26, 1897, 222 MS. Dom. Let. 21, enclosing the four reports of the latter, all dated June 30, 1897, with enclosures, all in original.

October 12, 1894, Mr. Romero, Mexican minister at Washington, represented the urgent necessity of a decision as to the taking of water from the Rio Grande in Colorado and New Mexico, which was said to have seriously affected the existence of the frontier communities for several miles below Paso del Norte. The communication was referred to the Secretary of Agriculture. There seemed to be reason to believe that the low state of the Rio Grande at Ciudad Juarez was due to drought rather than to the use of the waters for irrigation.

For. Rel. 1894, 395, 397.

"The problem of the storage and use of the waters of the Rio Grande for irrigation should be solved by appropriate concurrent action of the two interested countries. Rising in the Colorado heights, the stream flows intermittently, yielding little water during the dry months to the irrigating channels already constructed along its course. This scarcity is often severely felt in the regions where the river forms a common boundary. Moreover the frequent changes in its course through level sands often raise embarrassing questions of territorial jurisdiction."

President Cleveland, annual message, Dec. 3, 1894.

The Mexican Government having represented that the diminution of the water in the Rio Grande by irrigation works on its upper waters and their affluents in Colorado and New Mexico was a viola-

tion of international law and of Article VII. of the treaty of Guadalupe Hidalgo of February 2, 1848, the Attorney-General of the United States advised (1) that, under international law, the United States was not obliged to deny to its inhabitants the use of the waters of that part of the river lying wholly within its jurisdiction, even though such use reduced the volume of water below the point where the river ceased to be wholly within the United States, and (2) that the operation of Article VII., which prohibited "any work that may impede or interrupt, in whole or in part," the right of navigation, was in terms limited to that part of the river which formed the common boundary between the two countries. The Attorney-General observed that it did not pertain to his Department to consider whether any action should be taken on grounds of comity or of policy.

Harmon, At.-Gen. (Dec. 12, 1895), 21 Op. 274.

Proceedings were taken in 1897 by the Attorney-General, under the acts of Congress of Sept. 19, 1890, § 10, 26 Stat. 426, 454, and July 13, 1892, § 3, 27 Stat. 88, 110, which prohibit the creation, without permission of the Secretary of War, of any obstruction to the navigable capacity of any waters in respect of which the United States has jurisdiction. It was held that this prohibition extended, not merely to obstructions built at places where a stream is navigable, but to "any obstruction to the navigable capacity," embracing "anything, wherever done or however done, within the limits of the jurisdiction of the United States, which tends to destroy the navigable capacity of one of the navigable waters of the United States." Hence, although it was found that the Rio Grande was not a navigable river in New Mexico, the case was remanded to the court below with instructions "to order an inquiry into the question whether the intended acts of the defendants in the construction of a dam and in appropriating the waters of the Rio Grande [at Elephant Butte, in New Mexico] will substantially diminish the navigability of that stream within the present limits of navigability, and if so, to enter a decree restraining those acts to the extent that they will so diminish." (*United States v. Rio Grande Dam and Irrigation Co.* (1899), 174 U. S. 690, 708-709, 710.)

See, *supra*, § 132, p. 654.

It seems that the further use of the River Pecos for irrigation purposes would not affect the international question between the United States and Mexico, since it "falls into the Rio Grande at a point where the diminution of its waters have little if any perceptible effect upon the volume passing downward from that point." (Mr. Olney, Sec. of State, to Sec. of Interior, Jan. 11, 1897, 215 MS. Dom. Let. 160.)

"The operations of the international commission organized under the convention of March 1, 1889, between the United States and Mexico to determine disputes which have arisen by reason of changes in the fluvial boundary of the two countries, having been extended for another year, until December 24, 1896, by a convention signed

October 1, 1895, occasion was taken at the same time, by a friendly understanding between the two Governments, to enlarge the duties of the commissioners by charging them to examine and report touching questions of irrigation and storage dams on the Rio Grande. Important issues are involved therein, only to be determined in principle, and, as to that part of the river which forms the common boundary, in fact also, by a conventional agreement of the two countries, so that it naturally behooves them to approach the discussion and negotiation with all possible knowledge, in order that the riparian rights of the respective owners of the river banks may be justly determined and intelligently enforced."

Report of Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896.

For correspondence as to the pumping station of the Arizona Improvement Company, on the Colorado River, near Yuma, see Mr. Sherman, Sec. of State, to Mr. Romero, Mex. min., April 18, 1898, MS. Notes to Mex. Leg. X. 390. In reply to a note of Mr. Romero of April 14; and Mr. Day, Sec. of State, to Mr. Romero, Mex. min., June 21, 1898, *id.* 414, enclosing a letter from the governor of Arizona of June 8, 1898, expressing the opinion that the pumping would "in no way impair the navigability of the river at any point."

The International Water Boundary Commission, as the result of their consideration of the subject of the "equitable distribution of the waters of the Rio Grande," "recommended an international dam and reservoir, approved by Mexico, but still under consideration by this Government."

President McKinley, annual message, Dec. 5, 1898.

See Reports on the Investigation and Survey for an International Dam and Reservoir on the Rio Grande del Norte to Preserve the Boundary Between the United States and Mexico by Controlling the Flood Waters of Said River, with Appendices A, B, C, D, and E, by Anson Mills, Major 10th Cavalry, Supervising Engineer Geological Survey, and W. W. Follett, Civil Engineer: Washington, Government Printing Office, 1896, 86 pp.

### 3. THE PHILIPPINES.

#### § 161.

As to the boundary of the Philippine Islands, see *supra*, § 109, pp. 530-531.

### 4. SAMOAN ISLANDS.

#### § 162.

As to the boundary of the American islands in the Samoan group, see *supra*, § 110, p. 553.

## IV. NORTHEASTERN FISHERIES.

## 1. TREATY OF 1782-83.

## § 163.

“The argument on which the people of America found their **Negotiations of** claim to fish on the banks of Newfoundland arises, **1782.** first, from their having once formed a part of the British Empire, in which state they always enjoyed, as fully as the people of Britain themselves, the right of fishing on those banks. They have shared in all the wars for the extension of that right; and Britain could with no more justice have excluded them from the enjoyment of it (even supposing that one nation could possess it to the exclusion of another), while they formed a part of that Empire, than they could exclude the people of London or Bristol. If so, the only inquiry is, How have we lost this right? If we were tenants in common with Great Britain while united with her, we still continue so, unless by our own act we have relinquished our title. Had we parted with mutual consent we should doubtless have made partition of our common right by treaty. But the oppressions of Great Britain forced us to a separation (which must be admitted, or we have no right to be independent); and it can not certainly be contended that those oppressions abridged our rights or gave new ones to Britain. Our rights, then, are not invalidated by this separation, more particularly as we have kept up our claim from the commencement of the war, and assigned the attempt of Great Britain to exclude us from the fisheries as one of the causes of our recurring to arms.”

Mr. R. R. Livingston, Secretary of State, to Dr. Franklin, January 7, 1782, 5 Wharton's Dip. Cor. Am. Rev. 87, 91; 9 Franklin's Works (Sparks' ed.), 135.

“Louisburg, on Cape Breton, held by the French, was supposed to be the most important and commanding station [in French North America] and to have more influence than any other upon the destinies of this part of the country. And, Mr. President, it was a force of between three and four thousand Massachusetts men, under Pepperell, and a few hundred from the colonies, with two hundred and ten vessels, that sailed to Louisburg, invested and took it for the British Crown in trust for the British Crown and her colonies.” (Mr. Dana, Halifax Com., II. 1653.)

Among the subjects discussed by the peace commissioners of the United States and Great Britain at Paris in 1782, the two that were the most strongly contested and the last disposed of were those of the fisheries and the compensation of the loyalists. The provisional articles of peace were concluded November 30, 1782. On the 25th of that month the British commissioners delivered to the American commissioners a third set of articles, containing fresh proposals of the Brit-

ish ministry, and representing the results of many weeks of negotiation. By the third article it was proposed that "the citizens of the United States shall have *the liberty* of taking fish of every kind on all the banks of Newfoundland, and also in the Gulf of St. Lawrence: and also to dry and cure their fish on the shores of the Isle of Sables and on the shores of any of the unsettled bays, harbors, and creeks of the Magdalen Islands, in the Gulf of St. Lawrence, so long as such bays, harbors, and creeks shall continue and remain unsettled, on condition that the citizens of the said United States do not exercise the fishery but at the distance of three leagues from all the coast belonging to Great Britain, as well those of the continent as those of the islands situated in the Gulf of St. Lawrence. And as to what relates to the fishery on the coast of the island of Cape Breton out of the said gulf, the citizens of the said United States shall not be permitted to exercise the said fishery but at the distance of fifteen leagues from the coasts of the island of Cape Breton."<sup>a</sup> This proposal, by which the citizens of the United States were forbidden not only to dry fish on the shores of Nova Scotia, but also to take fish within three leagues of the coasts in the Gulf of St. Lawrence and within fifteen leagues of the coasts of Cape Breton outside of that gulf, was unacceptable to the American commissioners. On the 28th of November John Adams drew up a counter project, which was submitted in a conference of the commissioners on the following day. It provided that the subjects of His Britannic Majesty and the people of the United States should "continue to enjoy, unmolested, the right to take fish of every kind, on the Grand Bank, and on all the other banks of Newfoundland; also in the Gulf of St. Lawrence, and in all other places, where the inhabitants of both countries used at any time heretofore to fish," and that the citizens of the United States should "have liberty to cure and dry their fish on the shores of Cape Sables, and any of the unsettled bays, harbors, or creeks of Nova Scotia, or any of the shores of the Magdalen Islands, and of the Labrador coast;" and that they should be "permitted, in time of peace, to hire pieces of land, for terms of years, of the legal proprietors, in any of the dominions of his Majesty, whereon to erect the necessary stages and buildings, and to cure and dry their fish."<sup>b</sup>

One of the British commissioners objected to the use of the word *right*, in respect of the taking of fish on the Grand Bank and other banks of Newfoundland, in the Gulf of St. Lawrence, "and in all other places, where the inhabitants of both countries used at any time heretofore to fish." Another said that "the word *right* was an obnoxious expression." Adams vehemently contended for the right

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<sup>a</sup> Wharton's *Dip. Cor. Am. Rev.* VI. 74-76.

<sup>b</sup> *Id.* 85.



of the people of America to fish on the banks of Newfoundland,<sup>a</sup> and finally declared that he would not sign any articles without satisfaction in respect of the fishery.<sup>b</sup> The British commissioners conceded the point, and after many suggestions and amendments<sup>c</sup> the following article was agreed on:

"ARTICLE III. It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the Gulph of St. Lawrence, and at all other places in the sea, where the inhabitants of both countries used at any time heretofore to fish; and also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use, (but not to dry or cure the same on that island;) and also on the coasts, bays and creeks of all other of his Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbours and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement, without a previous agreement for that purpose with the inhabitants, proprietors or possessors of the ground."

By this article it was agreed that the people of the United States should continue to enjoy the "right" to take fish on all the banks of Newfoundland and in the Gulf of St. Lawrence, and "at all other places in the sea," where the inhabitants of both countries had been accustomed to fish; and that the inhabitants of the United States should have the "lib-

<sup>a</sup> "Can there be a clearer right?" exclaimed Adams. "In former treaties, that of Utrecht, and that of Paris, France and England have claimed the right and have used the word. (Id. 86.)

<sup>b</sup> "The inhabitants of the United States had as clear a right to every branch of the fisheries, and to cure fish on land, as the inhabitants of Canada or Nova Scotia: . . . the citizens of Boston, New York, or Philadelphia had as clear a right to those fisheries, and to cure fish on land, as the inhabitants of London, Liverpool, Bristol, Glasgow, or Dublin. 4. That the third article was demanded as an *ultimatum*, and it was declared that no treaty of peace should be made without that article; and when the British ministers found that peace could not be made without that article, they consented; for Britain wanted peace, if possible, more than we did. 5 We asked no favor, we requested no grant, and would accept none." (Ex-President John Adams to William Thomas, August 10, 1822, Adams' Works, X. 403. This letter was quoted and its positions adopted by Mr. Cass in his speech on the fisheries in the Senate on August 3, 1852 (App. Cong. Globe, 1852, 32 Cong. 1 sess. 894.) See report on the fisheries by Lorenzo Sabine, 1853.)

<sup>c</sup> Wharton's Dlp. Cor. Am. Rev. VI. 86

erty" to take fish on the coast of Newfoundland and on the coasts, bays, and creeks of all other of His Britannic Majesty's dominions in America, and also the "liberty" to dry and cure fish, subject to the conditions stated in the article.

When the plenipotentiaries of the United States and Great Britain met at Ghent on the 8th of August, 1814, the British plenipotentiaries, after proposing three points for discussion, said that, before they desired an answer on these points, "they felt it incumbent upon them to declare that the British Government did not deny the right of the Americans to fish generally, or in the open seas; but that the privileges formerly granted by treaty to the United States of fishing within the limits of the British jurisdiction, and of landing and drying fish on the shores of the British territories, would not be renewed without an equivalent." What they considered to be exclusively British waters they did not state.<sup>a</sup> On the 19th of August they also brought forward, as a subject of discussion, the free navigation of the Mississippi, which had been secured to British subjects by the treaty of peace of 1783.<sup>b</sup> On the 10th of November the American plenipotentiaries submitted to the British plenipotentiaries a project of a treaty: and in the note that accompanied it they said they were "not authorized to bring into discussion any of the rights or liberties" which the United States had theretofore enjoyed in relation to the fisheries. The project contained nothing either as to the fisheries or the Mississippi; but the British plenipotentiaries, in returning it, inserted in one of the articles relating to the boundary westward from the Lake of the Woods an amendment to the effect that British subjects should have and enjoy the free navigation of that river.<sup>c</sup> The American plenipotentiaries offered to enlarge this amendment by making it also provide that the inhabitants of the United States should "continue to enjoy the liberty to take, dry, and cure fish in places within the exclusive jurisdiction of Great Britain," or else to omit the article altogether.<sup>d</sup> In reply the British plenipotentiaries proposed, while retaining the article, to substitute for the previous amendments a stipulation embracing two clauses, one to the effect that His Britannic Majesty would enter into negotiations with the United States for the preservation to the latter of the "liberty" in the fisheries, as stipulated by the treaty of 1783, in consideration of "a fair equivalent" to be granted to the United States "for such liberty as aforesaid;" and the other to the effect that the United States would enter into negotiations as to the terms on which the navigation of the Mississippi, as stipulated in the treaty of 1783, should be preserved to His Britannic Majesty.<sup>e</sup> The American plenipotentiaries answered that a stipula-

<sup>a</sup> Am. State Papers, For. Rel. III. 705.

<sup>b</sup> Id. 710.

<sup>c</sup> Id. 738.

<sup>d</sup> Id. 742.

<sup>e</sup> Id. 743.

tion that the parties would in the future negotiate on the subjects in question was unnecessary; they were willing to be silent in regard to both of them or to agree to an engagement, couched in general terms, so as to embrace all subjects of difference not yet adjusted, or so expressed as not to imply the abandonment of any right claimed by the United States.<sup>a</sup> Under these circumstances the British plenipotentiaries withdrew their proposed stipulation, saying: "The undersigned, returning to the declaration made by them on the 8th of August, that the privileges of fishing within the limits of the British sovereignty, and of using the British territories for purposes connected with the fisheries, were what Great Britain did not intend to grant without an equivalent, are not desirous of introducing any article on the subject. With a view of removing what they consider as the only objection to the immediate conclusion of the treaty, the undersigned agree to adopt the proposal made by the American plenipotentiaries . . . of omitting the 8th article altogether."<sup>b</sup> Thus it came about that the treaty concluded at Ghent on December 24, 1814, contained no mention either of the fisheries or of the navigation of the Mississippi.

On the 19th of June, 1815, an American fishing vessel, engaged in Lord Bathurst's the cod fishery, was, when about forty-five miles Position as to from Cape Sable, warned by the commander of the "Rights" and British sloop *Jaseur* not to come within sixty miles "Liberties." of the coast. This act the British Government disavowed;<sup>c</sup> but Lord Bathurst is reported at the same time to have declared that, while it was not the Government's intention to interrupt American fishermen "in fishing anywhere in the open sea, or without the territorial jurisdiction, a marine league from the shore," it "could not permit the vessels of the United States to fish within the creeks and close upon the shores of the British territories."<sup>d</sup> John Quincy Adams, who was then minister of the United States in London, maintained that the treaty of peace of 1783 "was not, in its general provisions, one of those which, by the common understanding and usage of civilized nations, is or can be considered as annulled by a subsequent war between the same parties."<sup>e</sup>

Lord Bathurst replied:

"To a position of this novel nature Great Britain can not accede. She knows of no exception to the rule, that all treaties are put an end to by a subsequent war between the same parties. . . . The treaty of 1783, like many others, contained provisions of different

<sup>a</sup> Am. State Papers, For. Rel. III, 744.

<sup>b</sup> Am. State Papers, For. Rel. III. 744, 745; J. Q. Adams, *The Fisheries and the Mississippi*, 54, 58; Gallatin's Writings, I. 646.

<sup>c</sup> Am. State Papers, For. Rel. IV. 349.

<sup>d</sup> Id. 350.

<sup>e</sup> Id. 352.

characters—some in their own nature irrevocable, and others of a temporary nature. . . . The nature of the liberty to fish within British limits, or to use British territory, is essentially different from the right of independence, in all that may reasonably be supposed to regard its intended duration. . . . In the third article [of the treaty of 1782–83], Great Britain acknowledges the *right* of the United States to take fish on the banks of Newfoundland and other places, from which Great Britain has no right to exclude an independent nation. But they are to have the *liberty* to cure and dry them in certain unsettled places within His Majesty's territory. If these liberties, thus granted, were to be as perpetual and independent as the rights previously recognized, it is difficult to conceive that the plenipotentiaries of the United States would have admitted a variation of language so adapted to produce a different impression; and, above all, that they should have admitted so strange a restriction of a perpetual and indefeasible right as that with which the article concludes, which leaves a right so practical and so beneficial as this is admitted to be, dependent on the will of British subjects, in their character of inhabitants, proprietors, or possessors of the soil, to prohibit its exercise altogether. It is surely obvious that the word *right* is, throughout the treaty, used as applicable to what the United States were to enjoy, in virtue of a recognized independence; and the word *liberty* to what they were to enjoy, as concessions strictly dependent on the treaty itself.”<sup>a</sup>

This position Great Britain continued to maintain. From 1815 to 1818 orders were issued by the British admiralty to seize American vessels found fishing in British waters, and though these orders were not continuously enforced; but were at various times and for various periods, generally with a view to negotiation, suspended, many seizures were actually made, and much ill feeling was engendered.<sup>b</sup>

“The nature of the rights and liberties consisted in the free participation in a *fishery*. That fishery, covering the bottom of the banks which surround the island of Newfoundland, the coasts of New England, Nova Scotia, the Gulf of Saint Lawrence, and Labrador, furnishes the richest treasure and the most beneficent tribute that ocean pays to earth on this terraqueous globe. By the pleasure of the Creator of earth and seas, it had been constituted in its physical nature *one* fishery, extending in the open seas around that island, to little less than five degrees of latitude from the coast, spreading along the whole northern coast of this continent and insinuating itself into all the bays, creeks, and harbors to the very borders of the shores.

<sup>a</sup> Am. State Papers, For. Rel. IV. 355, 356.

<sup>b</sup> Memoirs of J. Q. Adams, III. 119, 265; IV. 61, March 18, 1818.

For the full enjoyment of an equal share in this fishery it was necessary to have a nearly general access to every part of it, the habits of the game which it pursues being so far migratory that they were found at different periods most abundant in different places, sometimes populating the banks and at others swarming close upon the shores. The latter portion of the fishery had, however, always been considered as the most valuable, inasmuch as it afforded the means of drying and curing the fish immediately after they were caught, which could not be effected upon the banks.

“By the law of nature this fishery belonged to the inhabitants of the regions in the neighborhood of which it was situated. By the conventional law of Europe it belonged to the European nations which had formed settlements in those regions. France, as the first principal settler in them, had long claimed the *exclusive* right to it. Great Britain, moved in no small degree by the value of the fishery itself, had made the conquest of all those regions upon France, and had limited by treaty, within a narrow compass, the right of France to any share in the fishery. Spain, upon some claim of prior discovery, had for some time enjoyed a share of the fishery on the banks, but at the last treaty of peace prior to the American Revolution had expressly renounced it.

“At the commencement of the American Revolution, therefore, this fishery belonged exclusively to the *British nation*, subject to a certain limited participation in it reserved by treaty stipulations to France.”

Mr. J. Q. Adams, *The Fisheries and the Mississippi*, 184.

“By the third article of the treaty of 1783 it was agreed that the people of the United States should *continue* to enjoy the fisheries of Newfoundland and the Bay of Saint Lawrence, and at all other places in the sea where the inhabitants of both countries *used at any time theretofore to fish*; and also that they should have certain fishing liberties on all the fishing coast within the British jurisdiction of Nova Scotia, Magdalen Islands, and Labrador. The title by which the United States held those fishing rights and liberties was the same. It was the possessory use of the right . . . at any time theretofore, as British subjects, and the acknowledgment by Great Britain of its *continuance* in the people of the United States after the treaty of separation. It was a national right; and, therefore, as much a *right*, though not so immediate an *interest*, to the people of Ohio and Kentucky, ay, and to the people of Louisiana, after they became a part of the people of the United States, as it was to the people of Massachusetts and Maine.”

Mr. J. Q. Adams, *The Fisheries and the Mississippi*, 96.

"The continuance of the fishing liberty was the great object of the article [the third of the treaty of 1783]; and the language of the article was accommodated to the severance of the jurisdictions, which was consummated by the same instrument. It was coinstantaneous with the severance of the jurisdiction itself, and was no more a grant from Great Britain than the *right* acknowledged in the other part of the article, or than the independence of the United States acknowledged in the first article. It was a continuance of possessions enjoyed before; and at the same moment and by the same act under which the United States acknowledged those coasts and shores as being under a *foreign* jurisdiction, Great Britain recognized the liberty of the people of the United States to use them for purposes connected with the fisheries."

Mr. J. Q. Adams, *The Fisheries and the Mississippi*, 188; adopted in Lyman's *Diplomacy of the United States* (2nd ed.), I. 117. which says:

- "The treaty of '83 was an instrument of a peculiar character. It differed in its most essential characteristics from most of the treaties made between nations. It was a treaty of partition;—a treaty to ascertain the boundaries and the right of the nations the mother country acknowledged to be created by that instrument."

"That this was the understanding of the article by the British Government as well as by the American negotiators is apparent to demonstration by the debates in Parliament upon the preliminary articles. It was made, in both houses, one of the great objections to the treaty. In the House of Commons, Lord North . . . said: 'By the third article we have, in our spirit of reciprocity, given the Americans an unlimited right to take fish of every kind on the Great Bank and on all the other banks of Newfoundland. But this was not sufficient. We have also given them the right of fishing in the Gulf of Saint Lawrence, and at all other places in the sea where they have heretofore enjoyed, *through us*, the privilege of fishing. They have likewise the power of even partaking of the fishery which we still retain. We have not been content with resigning what we possessed, but even share what we have left.' . . . In this speech the whole article is considered as an improvident concession of British property; nor is there suggested the slightest distinction in the nature of the grant between the right of fishing on the banks and the liberty of the fishery on the coasts. Still more explicit are the words of Lord Loughborough, in the House of Peers. 'The fishery,' says he, '*on the shores retained by Britain* is, in the next article, not ceded, but *recognized* as a right inherent in the Americans, which, though no longer British subjects, they are *to continue to enjoy unmolested*, no right on the other hand being reserved to British subjects to approach their shores, for the purpose of fishing, in this reciprocal treaty.'"

Mr. J. Q. Adams, *The Fisheries and the Mississippi*, 189, 190.

“As a possession, it was to be held by the people of the United States as it had been held before. It was not like the lands partitioned out by the same treaty, a corporeal possession, but, in the technical language of the English law, an *incorporeal hereditament*, and in that of the civil law a *right of mere faculty*, consisting in the power and liberty of exercising a trade, the places in which it is exercised being occupied only for the purposes of the trade. Now the right or liberty to enjoy this possession, or to exercise this trade, could no more be affected or impaired by a declaration of war than the right to the territory of the nation. The interruption to the exercise of it, during the war, could no more affect the right or liberty than the occupation by the enemy of territory could affect the right to that. The right to territory could be lost only by abandonment or renunciation in the treaty of peace; by agreement to a new boundary line, or by acquiescence in the occupation of the territory by the enemy. The fishery liberties could be lost only by express renunciation of them in the treaty, or by acquiescence in the principle that they were forfeited, which would have been a tacit renunciation.”

Mr. J. Q. Adams, *The Fisheries and the Mississippi*, 190; adopted in 1 Lyman's *Diplomacy of the U. S.* 117.

“In the case of a cession of territory, when the possession of it has been delivered, the article of the treaty is no longer a compact between the parties, nor can a subsequent war between them operate in any manner upon it. So of all articles the purport of which is the *acknowledgment* by one party of a pre-existing right belonging to another. The engagement of the acknowledging party is consummated by the ratification of the treaty. It is no longer an executory contract, but a perfect right united with a vested possession is thenceforth in one party, and the acknowledgment of the other is in its own nature irrevocable. As a bargain, the article is extinct; but the right of the party in whose favor it was made, is complete, and can not be affected by a subsequent war. A *grant* of a facultative right or incorporeal hereditament, and specifically of a right of fishery, from one sovereign to another, is an article of the same description. . . . In the debates in Parliament on the peace of Amiens, Lord Auckland said: ‘He had looked into the works of all the first publicists on these subjects, and had corrected himself in a mistake still prevalent in the minds of many, who state, in an unqualified sense, that all treaties between nations are annulled by war, and must be specially renewed if meant to be in force on the return of peace. It is true that treaties in the nature of compacts or concessions, the enjoyment of which has been interrupted by the war, and has not been renewed at the pacification, are rendered null by the war. But compacts not interrupted by the course and effect of hostilities, *such as the regulated exercise*

*of a fishery on the respective coasts of the belligerent powers, the stipulated right of cutting wood in a particular district, or possessing rights of territory heretofore ceded by treaty, are certainly not destroyed or injured by war.*' . . . The Earl of Carnarvon—a member of the opposition, said, in the same debate, . . . 'War does not abrogate any right, or interfere with the right, though it does with the exercise, but such as it professes to litigate by war.' The same position was taken by Lord Eldon and Mr. Fox.

Mr. J. Q. Adams, *The Fisheries and the Mississippi*, 194–196, 197, citing 23 Hansard, Parl. History, 1147.

Fisheries "on the coasts and bays of the provinces conquered in America from France were acquired by the common sword, and mingled blood of Americans and Englishmen—members of the same empire, we, with them, had a common right to these fisheries; and, in the division of the empire, England confirmed our title without condition or limitation, a title equally irrevocable with those of our boundaries or of our independence itself."

Note to speech of Mr. Rufus Klug, in Senate, April 3, 1818, *Annals of Cong.* 15 Cong. 1 sess. I. 338.

Mr. C. A. Rodney, who had been Attorney-General under Mr. Jefferson, and had since then filled important public offices, was consulted (being then a Senator of the United States) by Mr. Monroe in November, 1818, on the fishery question. From his reply the following passages are extracted:

"When the treaty of Amiens, in 1802, between Great Britain, France, Spain, and Holland, was under discussion in Parliament, it was objected by some members that there was a culpable omission in consequence of the non-renewal of certain articles in former treaties or conventions securing to England the gum trade of the river Senegal and the right to cut logwood at the Bay of Honduras, etc. In answer to this objection in the House of Lords it was well observed by Lord Aycland 'that from an attentive perusal of the works of the publicists, he had corrected, in his own mind, an error, still prevalent, that all treaties between nations are annulled by a war, and to be re-enforced must be specially renewed on the return of peace. It was true that treaties in the nature of compacts or concessions the enjoyment of which has been interrupted by the war are thereby rendered null; but compacts which were not impeded by the course and effect of hostilities, such as *the rights of a fishery on the coasts of either of the belligerent powers*, the stipulated right of cutting logwood in a particular district—compacts of this nature were not affected by war. . . . It had been intimated by some that by the non-renewal of the treaty of 1786 our right to cut logwood might be dis-



puted; but those he would remind of the principle already explained, that treaties the exercise of which was not impeded by the war were reestablished with peace. . . . He did not consider our rights in India or at Honduras in the least affected by the non-renewal of certain articles in former treaties.'

"Lord Ellenborough (chief justice of the court of King's bench) 'felt surprise that the non-renewal of treaties should have been urged as a serious objection to the definitive treaty. . . . He was astonished to hear men of talents argue that the public law of Europe was a dead letter because certain treaties were not renewed.'

"Lord Eldon (then and at present the high chancellor of England and a member of the cabinet) 'denied that the rights of England in the Bay of Honduras or the river Senegal were affected by the non-renewal of treaties.'

"In the House of Commons, in reply to the same objection made in the House of Lords, it was stated by Lord Hawkesbury, the present Earl of Liverpool, then secretary of state for the foreign department and now prime minister of England, which post he occupied when the treaty of Ghent was concluded, 'that to the definitive treaty two faults had been imputed, of omission and commission. Of the former the chief was the non-renewal of certain treaties and conventions. He observed the principle on which treaties were renewed was not understood. He affirmed that the separate convention relative to our East India trade, and to our right of cutting logwood in the Bay of Honduras, had been altogether misunderstood. Our sovereignty in India was the result of conquest, not established in consequence of stipulations with France, but acknowledged by her as the foundation of them; our rights in the Bay of Honduras remained inviolate, the privilege of cutting logwood being unquestionably retained. . . . He did not conceive our rights in India or at Honduras were affected by the non-renewal of certain articles in former treaties.'

"It is remarked in the Annual Register that Lord Hawkesbury's speech contained the ablest defense of the treaty. The chancellor of the exchequer, Mr. Addington, the present Lord Sidmouth, and the late Mr. Pitt supported the same principles in the course of debate. I presume our able negotiators at Ghent entertained the same opinions when they signed the late treaty of peace.

"It may be recollected that during the Revolutionary war, when the British Parliament were passing the act to prohibit the colonies from using the fisheries, some members urged with great force and eloquence 'that the absurdity of the bill was equal to its cruelty and injustice; that its object was to take away a trade from the colonies which all who understood its nature knew they could not transfer to

themselves; that God and nature had given the fisheries to New and not to Old England.' ”

Letter of C. A. Rodney, Nov. 4, 1818, Monroe MSS. Library of Congress.

In the same letter Mr. Rodney said: “From the very moment the United States became a sovereign power they were clearly entitled to an enjoyment of these rights [to the fisheries] by the law of nations.”

See *McIlvaine v. Cox*, 4 Cranch, 209; *John Adams' Works*, I. 292, 343, 368, 370, 373, 670; II. 174; III. 263, 318, 319; VII. 45, 654; VIII. 5, 11, 439; IX. 487, 563; X. 131, 137, 160, 354, 403.

Following the letter of Mr. Rodney above quoted, Wharton, in his *International Law Digest*, III. 45, cites the ruling in *Sutton v. Sutton*. This case arose under Art. IX. of the Jay treaty of 1794, which provided that citizens of the one country holding lands in the other should continue to hold them according to the nature and tenure of their respective estates and titles, and that neither they nor their heirs or assigns should, so far as concerned such lands and the legal remedies incident thereto, be regarded as aliens. On the question whether this article was abrogated by the war of 1812 and the rights acquired thereunder destroyed, Sir J. Leach, master of the rolls, in 1830, held: “The relations which had subsisted between Great Britain and America when they formed one empire led to the introduction of the ninth section of the treaty of 1794, and made it highly reasonable that the subjects of the two parts of the divided empire should, notwithstanding the separation, be protected in the mutual enjoyment of their landed property; and the privileges of natives being reciprocally given not only to the actual possessors of lands but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace.” (*Sutton v. Sutton*, 1 *Rus. & M.* 663, 675.)

Wharton suggests, also, “that for the same reason that rights to fisheries are not extinguished by war, fishing boats are ordinarily exempt from seizure in war.”

“The treaty of peace (1783) did not grant independence, nor did it create the distinct colonies, afterwards States in the Federal Union of the United States, nor did it assign their boundaries, or endow them with franchises or servitudes such as their rights in the fisheries. ‘The relations which had subsisted between Great Britain and America,’ to adopt the language of the Master of the Rolls in *Sutton v. Sutton*, 1 *Myl. & R.*, 675, ‘when they formed one empire,’ ‘made it highly reasonable’ in framing the treaty of peace, ‘that the subjects of the two parts of the divided empire should, notwithstanding the separation, be protected in the mutual enjoyment’ of certain territorial rights. It was certainly ‘reasonable’ that the British negotiators should have adopted the principle of partition as above stated. They represented a ministry which, though afterwards torn asunder by the personal contentions of Shelburne and Fox, entered into power pledged to the concession of a friendly separation between the two sec-

tions, conceding to each mutual rights of territoriality. Aside from the fact that such a separation, carrying with it a retention of old reciprocal rights, was far less galling to Great Britain than would be the admission that independence was wrung from her by conquest; the idea of a future reciprocity between the two nations, based on old traditions, as moulded by modern economical liberalism, was peculiarly attractive to Shelburne, by whom, as prime minister, the negotiations were ultimately closed. (See Franklin MSS., deposited in Department of State; Bancroft's Formation Fed. Const., vol. VI, ch. 1.) On this basis alone, also, could, as we will presently see, British subjects be secure of taking, by inheritance or purchase, landed estates in the United States; on this basis alone could Great Britain be sure of a common enjoyment of the lakes and of the Mississippi, whose northern waters were then supposed to pass in part through British territory. Hence, unquestionably under the influence of this view, which was then pressed by Great Britain at least as eagerly as it was by the United States, no word of cession or grant was introduced into the preliminary articles of peace or into the treaty of peace based on them. So far from this being the case, they adopt the phraseology of treaties of partition, or, as the Master of the Rolls calls it, of 'separation.' The two sections of the empire agree to separate, each taking with it its territorial rights as previously enjoyed; and among these rights, that which was most important to the United States, and was most conspicuously before the commissioners, was that to the common use of the fisheries. Applying to the fisheries this principle of partition or of 'separation,' which it was then so essential for Great Britain, in view of the great interests held by her subjects in the United States, to assert, the commissioners accepted, as part of the same system, the position that the United States held, in common with Great Britain, the fisheries which previously it had held, in entirety with Great Britain, when it was subject to titular British supremacy."

Note of Dr. Wharton, Wharton's Int. Law Dig. III. 40-41.

The same author, in his International Law Digest, 2nd edition, Appendix, § 303, page 983, citing Blaine's Twenty Years of Congress, II. 617, and 2 Chalmers' Opinions of Eminent Lawyers, 344, says: "In 1768 the law officers of the Crown gave an opinion that the fishery clauses in the treaty of 1686 with France were permanent, and not affected by subsequent war." The opinion here referred to seems to be that which was given by the law officers in 1765, as to the duration of the treaty between England and France of November 16, 1686, this being the only opinion to be found in Chalmers on the subject. The question that was under consideration related particularly to the fifth and sixth clauses of the treaty, which *prohibited* the subjects of the one party to trade and fish in places possessed by the other in America, and provided for the confiscation of ships found violating the pro-

hibition. It appears that the Attorney-General and Solicitor-General, Ryder and Murray, gave an opinion, April 7, 1753, that the treaty was then in force. It also appears that the Attorney-General and Solicitor-General, Norton and De Grey, February 12, 1765, held that the treaty was not then in force; though Sir James Marriott, Advocate-General, expressed the opinion, February 15, 1765, that it was "a subsisting treaty, not only because it is revived by a strong implication of words and facts, but for that it may be understood to subsist because it never was abrogated." (Chalmers' *Opinions of Eminent Lawyers*, Am. ed. 1858, pp. 625, 628-629, 638.)

"The prevalent opinion is that a war between two sovereigns does not by itself vacate such provisions in treaties theretofore existing between them as relate to primary national prerogatives, such, for instance, as national independence, boundary, or other integral appurtenances of sovereignty. As such appurtenances of the sovereignty of the New England States the fisheries are to be classed. The war of 1812, therefore, no more vacated the title of the United States to its common share in the northeastern fisheries than it vacated the independence of the States or the boundaries which separated their territories from those of Great Britain."

Wharton, *Int. Law Dig.* III. 43.

"It is worthy of notice that the claim of British settlers to the use of the coast and waters of the Belize for the purpose of cutting and shipping logwood and mahogany, which claim was based on a remote informal grant from Spain when sovereign of those shores, has always been asserted by Great Britain to have adhered to the British Crown unaffected by intermediate wars between Great Britain and Spain. See Lord Hawkesbury's speech, quoted above by Mr. Rodney."

Wharton, *Int. Law Dig.* III. 45.

## 2. CONVENTION OF 1818.

### § 164.

October 20, 1818, Albert Gallatin and Richard Rush concluded the convention, the first article of which reads as follows:

"ARTICLE I. Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof, to take, dry, and cure fish on certain coasts, bays, harbours, and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties, that the inhabitants of the said United States shall have forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the

shores of the Magdalen Islands, and also on the coasts, bays, harbours, and creeks from Mount Joly on the southern coast of Labrador, to and through the Straights of Belleisle and thence northwardly indefinitely along the coast, without prejudice however, to any of the exclusive rights of the Hudson Bay Company: And that the American fishermen shall also have liberty forever, to dry and cure fish in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland hereabove described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on, or within three marine miles of any of the coasts, bays, creeks, or harbours of his Britannic Majesty's dominions in America not included within the above-mentioned limits; Provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."

Comparing the stipulations of the treaty of 1783 and of the convention of 1818 we have the following results:

Treaty of 1783, Article III.	{ I. Right to take fish—	{ 1. On the Banks of Newfoundland; 2. In the Gulf of St. Lawrence: and 3. At all other places in the sea.
	{ II. Liberty.	{ 1. To take fish on the British coasts generally. 2. To dry and cure fish in any of the unsettled bays, harbors, and creeks of Nova Scotia, Magdalen Islands, and Labrador.
Convention of 1818, Article I.	{ I. Right remains as under treaty of 1783.	{ 1. To take fish renounced, except as to (a) the southern coast of Newfoundland from Cape Ray to the Rameau Islands; (b) the western and northern coasts of Newfoundland from Cape Ray to the Quirpon Islands; (c) the shores of the Magdalen Islands, and (d) the coast of Labrador from Mount Joly eastwardly and northwardly indefinitely.
	{ II. Liberty.	{ 2. To dry and cure fish renounced, except as to (a) the unsettled bays, harbors, and creeks of the southern coast of Newfoundland from Cape Ray to the Rameau Islands, and (b) the coast of Labrador.

"Neither side yielded its convictions to the reasoning of the other. This being exhausted, there was no resource left with nations disposed to peace but a compromise. Great Britain grew willing to give up something. The United States consented to take less than the whole. . . . The most difficult part of our task was on the question of permanence. Britain would not consent to an express clause that a future war was not to abrogate the rights secured to us. We inserted the word *forever*, and drew up a paper to be of record in the negotiation, purporting that if the convention should from any cause to be vacated, all anterior rights were to revive. . . . It was by *our* act that the United States *renounced* the right to the fisheries not guaranteed to them by the convention. . . . We deemed it proper under a three-fold view: 1, to exclude the implication of the fisheries being secured to us being a new grant; 2, to place the rights secured and renounced, on the same footing of permanence; 3, that it might expressly appear, that our renunciation was limited to three miles from the coast."

Rush's Residence at the Court of London, Philadelphia, 1833, pp. 398-400  
See, also, Am. State Papers, For. Rel. IV. 380-406.

See Mr. Gallatin to Mr. Adams, Nov. 6, 1818, 2 Gallatin's Writings, 82;  
Mr. Rush to Mr. Monroe, Oct. 22, 1818, MS. Monroe Papers.

"The principle asserted by the American plenipotentiaries at Ghent has been still asserted and maintained through two long and arduous negotiations with Great Britain, and has passed the ordeal of minds of no inferior ability. It has terminated in a new and satisfactory arrangement of the great interest connected with it, and in a substantial admission of the principle asserted by the American plenipotentiaries at Ghent."

Mr. J. Q. Adams, *The Fisheries and the Mississippi*, 97, 98. See, also, *id.* 109.

Lyman, *Dip. of the United States*, II. 88, says: "The most important matter adjusted at this negotiation [of 1818] was the fisheries. The position assumed at Ghent, that the fishery rights and liberties were not abrogated by war, was again insisted on, and those portions of the coast fisheries relinquished on this occasion were renounced by express provision, fully implying that the whole right was not considered a new grant."

Mr. J. C. Bancroft Davis, in his *Treaty Notes*, says: "John Quincy Adams . . . contended that the treaty of 1783 was not 'one of those which . . . can be considered as annulled by a subsequent war between the same parties.' Lord Bathurst replied: 'To a position of this novel nature Great Britain cannot accede. . . .' During the negotiations which followed Great Britain never abandoned that position, and the United States may be said to have acquiesced in it. By it they secured the exclusion of Great Britain from the Mississippi, the free and open navigation of which was granted to the subjects of Great Britain forever by the treaty which Lord Bathurst set aside." (*United States Treaty Volume, 1776-1887, 1237.*)

On June 14, 1819, an act was passed by the Imperial Parliament to carry the foregoing article into effect. It closely followed the language of the article, and provided regulations and penalties for its enforcement.<sup>a</sup> After this act went into effect several seizures were made, and from 1824 to 1826 more or less correspondence took place in regard to three vessels which, after being seized in the Bay of Fundy, were rescued by a band of armed men from Eastport, Maine.<sup>b</sup>

From that time down to 1836 little trouble seems to have occurred. But in that year the legislature of Nova Scotia passed an act, commonly called the "hovering act," by which the hovering of vessels within three miles of the coasts or harbors was sought to be prevented by various regulations and penalties;<sup>c</sup> and subsequently claims were asserted to exclude fishermen from all bays and even from all waters within lines drawn from headland to headland, to forbid them to navigate the Gut of Canso, and to deny them all privileges of traffic, including the purchase of bait and supplies in the British colonial ports. From 1839 down to 1854 there were numerous seizures, and in 1852 the home government sent over a force of war steamers and sailing vessels to assist in patrolling the coast.

In support of their contention as to bays, the British authorities invoked the words of the convention of 1818—the renunciation of the liberty to take, dry, or cure fish within three marine miles of the "coasts, bays, creeks, or harbors," etc. It was argued that this renunciation embraced all bays *eo nomine*, no matter what their extent. Against this claim the United States protested, and in 1845 the British Government yielded the point with regard to the Bay of Fundy,<sup>d</sup> but declared that the concession applied to that bay only.<sup>e</sup> In a paper, dated at the Department of State, July 6, 1852, and published in the

<sup>a</sup> Sabine's Fisheries, 220; 6 Brit. & For. State Papers, 946.

<sup>b</sup> See message of President Monroe of Feb. 16, 1825, as to "capture and detention by British armed vessels of American fishermen," H. Doc. 93, 18 Cong. 2 sess.; Am. State Papers, For. Rel. V. 675; S. Ex. Doc. 100, 32 Cong. 1 sess. 5, 11, 54, 55-58. As to the Newfoundland fishery, see Am. State Papers, For. Rel. V. 548, 579-580.

<sup>c</sup> S. Ex. Doc. 100, 32 Cong. 1 sess. 108.

<sup>d</sup> Lord Aberdeen, Foreign Secretary, to Mr. Everett, Am. min., March 10, 1845, S. Ex. Doc. 100, 32 Cong. 1 sess. 135.

<sup>e</sup> Lord Aberdeen, For. Sec., to Mr. Everett, Am. min., April 21, 1845, S. Ex. Doc. 100, 32 Cong. 1 sess. 153. See Mr. Everett, min. to England, to Mr. Upshur, Sec. of State, Aug. 15, 1843, MSS. Dept. of State, a brief extract being printed in S. Ex. Doc. 100, 32 Cong. 1 sess. 120; and Mr. Everett, min. to England, to Mr. Calhoun, Sec. of State, March 25, 1845, MSS. Dept. of State, extracts being printed in S. Ex. Doc. 100, 32 Cong. 1 sess. 134.

Boston *Courier* on the 19th of the same month, Mr. Webster, who was then Secretary of State, remarked, with reference to the use of the term "bays," that "it was undoubtedly an oversight in the convention of 1818 to make so large a concession to England;" but he added that he did not agree that the British construction of the term was "conformable to the intentions of the contracting parties."<sup>a</sup> Later in the same year Lord Malmesbury stated that the British Government were prepared to maintain that the "relaxation" granted in 1845, with reference to the Bay of Fundy, was reasonable and just, but he abstained from entering into any discussion as to the interpretation of the term "bay," declaring that it was his intention to leave the matter where it was left in 1845, any further discussion of the question being a matter of negotiation between the two Governments.<sup>b</sup> The difference between the two Governments was that the United States claimed the right to enter the Bay of Fundy under the convention, while Great Britain admitted it under the "concession" of 1845.<sup>c</sup>

As has been seen, the renunciation in the convention of 1818 of the right to take, dry, or cure fish within three marine miles of the "coasts, bays, creeks, or harbors," is followed by the proviso that the American fishermen may enter "such bays or harbors" for the purposes of shelter, repairing damages, purchasing wood, and obtaining water. In the debates in the Senate in the summer of 1852, Mr. Cass, in a speech of the 3d of August, after commenting upon the fact that there are "bays," such as the Bay of Biscay and Baffins Bay, which are in reality open seas, proceeded to maintain that the "bays" of the convention, as shown by the association of the word "harbors," in connection with shelter and repair of damages, were the small bodies of water into which fishing vessels were accustomed to run for those purposes. "That such was the understanding of our negotiators is," said Mr. Cass, "rendered clear by the terms they employ in their report upon this subject. They say: 'It is in that point of view that the privilege of entering the ports for shelter is useful,' etc. Here the word 'ports' is used as a descriptive word, embracing both the bays and harbors within which shelter may be legally sought, and shows the kind of bays contemplated by our framers of the treaty. And it is not a little curious that the legislature of Nova Scotia have applied the same meaning to a similar term. An act of that Province was passed March 12, 1836, with this title: 'An act relating to

<sup>a</sup> Sabine's Fisheries, 263-265.

<sup>b</sup> Lord Malmesbury. For. Sec., to Mr. Crampton, Min. to United States, Aug. 10, 1845, Sen. Confid. No. 4, Feb. 28, 1853, special session, 6-7.

<sup>c</sup> Mr. Everett, Sec. of State, to Mr. Ingersoll, min. to England, Dec. 4, 1852, message of Pres. Fillmore, Feb. 28, 1853, Sen. Confid. No. 4, special session, 12, 15.



the fisheries in the Province of Nova Scotia and the coasts and harbors thereof,' which act recognizes the convention, and provides for its execution under the authority of an imperial statute. It declares that harbors shall include bays, ports, and creeks. Nothing can show more clearly their opinion of the nature of the shelter secured to the American fishermen."<sup>a</sup>

The same view was expounded by Mr. Hamlin.<sup>b</sup>

It seems that it formerly was the custom among fishermen to speak of the whole of the Gulf of St. Lawrence as the Bay of Chaleur.<sup>c</sup>

Related to the question as to bays, but not identical with it, was the "headland" theory, by which name was designated the pretension that the three marine miles from the "coasts, bays, creeks, or harbors" should, not only in the case of bodies of water known as bays, but also along other parts of the coast, be measured from a line drawn from headland to headland. In an opinion given to Lord Palmerston in 1841, and afterwards published at Halifax, the law officers of the Crown, Messrs. Dodson and Wilde, held that the American fishermen had no right to fish in the bays of Nova Scotia; and they stated that they based this opinion on the fact that the term "headland" was "used in the treaty" for the purpose of "excluding the interior of the bays of the coast." As the term "headland" is not used in the convention of 1818, the law officers seem to have mistaken a sentence in the *ex parte* case made up at Halifax, in which the word "headland" appears, for an extract from the treaty.<sup>d</sup>

"The schooner *Washington* was seized by the revenue schooner *Case of the Julia*, Captain Darby, while fishing in the Bay of "Washington." Fundy ten miles from the shore, on the 10th of May, 1843, on the charge of violating the treaty of 1818. She was carried to Yarmouth, Nova Scotia, and there decreed to be forfeited to the Crown by the judge of the vice-admiralty court, and with her stores ordered to be sold. The owners of the *Washington* claim for the value of the vessel and appurtenances, outfits, and damages, \$2,483, and for eleven years' interest, \$1,638, amounting together to \$4,121. By the recent reciprocity treaty, happily concluded between the United States and Great Britain, there seems no chance for any future disputes in regard to the fisheries. It is to be regretted that in that treaty provision was not made for settling a few small claims, of no

<sup>a</sup> Cong. Globe, 32 Cong. 1 sess., Appendix, p. 895.

<sup>b</sup> *Id.* 900.

<sup>c</sup> Mr. Foster, United States agent, Documents and Proceedings of the Halifax Commission, II. 1590.

<sup>d</sup> Mr. Everett, Sec. of State, to Mr. Ingersoll, min. to England, Dec. 4, 1852, Sen. Confid. No. 4, Feb. 28, 1853, special session, 16-17.

importance in a pecuniary sense, which were then existing, but as they have not been settled they are now brought before this commission.

"The *Washington*, fishing schooner, was seized, as before stated, in the Bay of Fundy, ten miles from the shore, off Annapolis, Nova Scotia. . . .

"The question turns, so far as relates to the treaty stipulations, on the meaning given to the word 'bays' in the treaty of 1783. By that treaty the Americans had no right to dry and cure fish on the shores and bays of Newfoundland, but they had that right on the coasts, bays, harbors, and creeks of Nova Scotia; and as they must land to cure fish on the shores, bays, and creeks, they were evidently admitted to the shores of the bays, etc. By the treaty of 1818 the same right is granted to cure fish on the coasts, bays, etc., of Newfoundland, but the Americans relinquished that right and the right to fish within three miles of the coasts, bays, etc., of Nova Scotia. Taking it for granted that the framers of the treaty intended that the word 'bay' or 'bays' should have the same meaning in all cases, and no mention being made of headlands, there appears no doubt that the *Washington*, in fishing ten miles from the shore, violated no stipulations of the treaty.

"It was urged on behalf of the British Government that by coasts, bays, etc., is understood an imaginary line, drawn along the coast from headland to headland, and that the jurisdiction of Her Majesty extends three marine miles outside of this line; thus closing all the bays on the coast or shore, and that great body of water called the Bay of Fundy against Americans and others, making the latter a British bay. This doctrine of headlands is new, and has received a proper limit in the convention between France and Great Britain of 2d August 1839, in which 'it is agreed that the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays, the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland.'

"The Bay of Fundy is from 65 to 75 miles wide and 130 to 140 miles long. It has several bays on its coasts. Thus the word bay, as applied to this great body of water, has the same meaning as that applied to the Bay of Biscay, the Bay of Bengal, over which no nation can have the right to assume the sovereignty. One of the headlands of the Bay of Fundy is in the United States, and ships bound to Passamaquoddy must sail through a large space of it. The island of Grand Menan (British) and Little Menan (American) are situated nearly on a line from headland to headland. These islands, as represented in all geographies, are situate in the Atlantic Ocean. The conclusion is, therefore, in my mind irresistible that the Bay of Fundy is not a British bay, nor a bay within the meaning of the word as used in the treaties of 1783 and 1818.

“The owners of the *Washington*, or their legal representatives, are therefore entitled to compensation, and are hereby awarded not the amount of their claim, which is excessive, but the sum of three thousand dollars, due on the 15th January 1855.”

Bates, umpire, convention between the United States and Great Britain of February 8, 1853. The whole of the judgment is here given except two paragraphs in which the stipulation of 1783 and 1818 are summarized. These paragraphs may be seen in Moore, *Int. Arbitrations*, IV. 4342, 4343; also, in S. Ex. Doc. 103, 34 Cong. 1 sess. 184.

Hornby, British commissioner, maintained that the seizure was justified, both on the ground that the Bay of Fundy was an indentation of the sea, over which Great Britain might by virtue of the Law of nations claim exclusive jurisdiction, and also on the ground that, by a fair construction of the convention of 1818, the Bay of Fundy was one of the “bays” in which, by that convention, the United States had renounced the right to take fish.

Upham, the American commissioner, denied both these contentions, citing Vattel, I. ch. 20, ss. 282, 283; Grotius, II. ch. 2, sec. 3; 1 Kent's Comm. 462; Sabine's Report on the Fisheries, 282, 294.

“The umpire, appointed agreeably to the provisions of the convention entered into between Great Britain and the United States on the 8th of February 1853 for the adjustment of claims by a mixed commission, having been duly notified by the commissioners under the said convention that they had been unable to agree upon the decision to be given with reference to the claim of the owners of the schooner *Argus*, of Portland, United States, Doughty, master, against the British Government; and having carefully examined and considered the papers and evidence produced on the hearing of the said claim and having conferred with the said commissioners thereon, hereby reports that the schooner *Argus*, 55 tons burden, was captured on the 4th August 1844, while fishing on St. Ann's Bank, by the revenue cruiser *Sylph*, of Lunenburg, Nova Scotia, commanded by William Carr—Phillip Dod, seizing master—carried to Sydney, where she was stripped and everything belonging to her sold at auction. At the time of the capture the *Argus* was stated on oath to have been 28 miles from the nearest land—Cape Smoke. There was therefore in this case no violation of the treaty of 1818. I therefore award to the owners of the *Argus*, or their legal representatives, for the loss of their vessel, outfits, stores, and fish, the sum of two thousand dollars on the 15th January 1855.”

Bates, umpire, December 23, 1854, commission under the convention between the United States and Great Britain of February 8, 1853, Moore, *Int. Arbitrations*, IV. 4344.

The *Argus* was seized because found fishing within a line drawn from headland to headland, from Cow Bay to Cape North, on the northeast side of the island of Cape Breton. (S. Ex. Doc. 113, 50 Cong. 1 sess. 59.)

In another case submitted to Mr. Bates as umpire—the case of the *Pallas*—it was alleged that the vessel was chased by a revenue cruiser from off Chittican Bay, Aug. 4, 1840, for forty or fifty miles, captured, and sent to Sydney, where she was detained six weeks, and then released. The case was dismissed by Mr. Bates for want of evidence, and the nature of the seizure is not stated. (Moore, Int. Arbitrations, IV. 4345.)

On May 14, 1870, the "headland" doctrine having been reasserted by Mr. Peter Mitchell, provincial minister of marine and fisheries, Lord Granville, British foreign secretary, on June 6, 1870, telegraphed to the governor-general as follows: "Her Majesty's Government hopes that the United States fishermen will not be, for the present, prevented from fishing, except within three miles of land or in bays which are less than six miles broad at the mouth." (Proceedings of Halifax Comm. I. 155.)

Replying, on July 23, 1886, to a protest by Mr. Bayard of June 14, 1886, against a warning alleged to have been given to United States fishing vessels by a Canadian customs official not to fish within lines drawn from headland to headland from Cape Canso to St Esprit, and from North Cape to East Point of Prince Edward Island, Lord Rosebery stated that no instruction to that effect had been issued by the Canadian government. It appeared, said Lord Rosebery, that the collector of Canso had, in conversation with the master of a fishing vessel, "expressed the opinion that the headland line ran from Cranberry Island to St. Esprit, but this was wholly unauthorized." (For. Rel. 1886, 408.)

In September, 1896, some American fishing vessels were warned not to fish on a shoal known as Fisherman's Bank, in the Gulf of St. Lawrence, near the entrance to Northumberland Strait, between the eastern part of Prince Edward Island and the northern part of Nova Scotia, at a distance of nearly 7 miles from Cape Bear, the nearest land. In reply to an inquiry of the United States consul at Charlottetown, the Canadian minister of marine and fisheries stated, Oct. 2, 1896, that Fisherman's Bank had always been claimed as Canadian waters, but that no new orders had been given in relation to it. Referring to this statement, Mr. Olney said that the claim of jurisdiction over Fisherman's Bank seemed to be based on the "headlands" contention, since the place could be included within the Canadian jurisdiction only by drawing a line across the open approaches to the Strait of Northumberland from East Point, on Prince Edward Island, to Cape St. George, in Nova Scotia, a distance of 35 miles. Referring to the correspondence of 1886, Mr. Olney said that he desired to renew the request then presented by Mr. Bayard and acquiesced in by the British Government that if any such orders as were alleged had been issued they should be revoked; and he added that if it should appear that the claim put forth rested on an assumption that the open waters of the Gulf of St. Lawrence were "bays, creeks, or harbors" in the sense of the convention of 1818, he must be permitted to renew Mr. Bayard's expression of regret "at any such unfortunate revival of a question which has long since been settled between the United States and Great Britain." (Mr. Olney, Sec. of State, to Sir J. Pauncefote, Brit. amb., Dec. 17, 1896, MS. notes to Gr. Br. XXIII. 516.)

July 15, 1839, Mr. Primrose, United States consul at Pictou, Nova Scotia, complained to the secretary of that province that American vessels bound to that port had been fired at and brought to at the Strait of Canso and compelled to pay light dues. He inquired whether the collectors were authorized to levy the duties on American vessels not bound to any port or place within the strait, and added: "The imposition of any tax by the province of Nova Scotia upon American vessels engaged in the prosecution of the fisheries using that passage *in transitu*, would appear to deprive it of the character of constituting a portion of the high seas."<sup>a</sup>

The colonial secretary replied that the collectors had been instructed not to demand light duty from vessels bound to Pictou, unless they came to anchor within the strait; but he said that the lieutenant-governor could not "admit the character given to the Gut of Canso as a part of the high seas until recognized by some authoritative decision, as the correctness of its application to that narrow passage lying entirely between the lands of this province may be questionable, more especially as an open communication around the eastern end of the island of Cape Breton is to be found on the high seas to the Gulf of St. Lawrence, or any other point to which the Strait of Canso can be made subservient."<sup>b</sup>

This claim was mentioned by Mr. Forsyth, Secretary of State, in an instruction relating to the fisheries, addressed to Mr. Stevenson, American minister in London, under date of Feb. 20, 1841. In this instruction Mr. Forsyth, after pointing out certain oppressive features of the Nova Scotian act of 1836 and the regulations made thereunder, said: "It will also be proper to notice the assertion of the provincial legislature, that the Strait of Canso is a 'narrow strip of water completely within and dividing several counties' of the province, and that our use of it is in violation of the convention of 1818. That strait separates Nova Scotia from the island of Cape Breton, which was not annexed to the province until 1820. In 1818, Cape Breton was enjoying a government of its own entirely distinct from Nova Scotia, the strait forming the line of demarcation between them, and being then, as now, a thoroughfare for vessels passing into and out of the Gulf of St. Lawrence. The union of the two colonies cannot be admitted as vesting in the province the right to close a passage which has been freely and indisputably used by our citizens since the year 1783, and it is impossible to conceive how the use, on our part, of this right of passage, common it is believed to all

<sup>a</sup> Mr. Primrose, U. S. consul, to the Hon. Sir R. D. George, provincial secretary, July 15, 1839, S. Ex. Doc. 100, 32 Cong. 1 sess. 73-74.

<sup>b</sup> Sir R. D. George, provincial secretary, to Mr. Primrose, consul at Pictou, Nov. 9, 1839, S. Ex. Doc. 100, 32 Cong. 1 sess. 81.

other nations, conflicts either with the letter or the spirit of our treaty obligations.”<sup>a</sup>

Mr. Stevenson duly communicated to Lord Palmerston the purport of his instructions, including the part embraced in the foregoing quotation.<sup>b</sup> Not long afterwards the British Government submitted to the law officers of the Crown a series of questions, embraced in the report adopted by the House of Assembly of Nova Scotia, to which Mr. Forsyth had referred when he spoke of the “assertion” of the provincial legislature. In the series of questions there was the following:

“4. Have American vessels, fitted out for the fishery, a right to pass through the Gut of Canso, which they cannot do without coming within the prescribed limits, or to anchor there or to fish there; and is casting bait to lure fish in the track of the vessels fishing, within the meaning of the convention?”

August 30, 1841, the law officers replied:

“4. By the treaty of 1818 it is agreed that American citizens should have the liberty of fishing in the Gulf of St. Lawrence, within certain defined limits, in common with British subjects; and such treaty does not contain any words negating the right to navigate the passage of the Gut of Canso, and therefore it may be conceded that such right of navigation is not taken away by that convention; but we have now attentively considered the course of navigation to the Gulf by Cape Breton, and likewise the capacity and situation of the passage of Canso, and of the British dominions on either side, and we are of opinion that, independently of treaty, no foreign country has the right to use or navigate the passage of Canso; and attending to the terms of the convention relating to the liberty of fishery to be enjoyed by the Americans, we are also of opinion that that convention did not either expressly or by implication concede any such right of using or navigating the passage in question. We are also of opinion that casting bait to lure fish in the track of any American vessels navigating the passage would constitute a fishing within the negative terms of the convention.”<sup>c</sup>

It does not appear that this document was ever officially communicated to the United States,<sup>d</sup> although the Government of Nova Scotia continued to agitate the question of prohibiting the passage of the

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<sup>a</sup> Mr. Forsyth, Sec. of State, to Mr. Stevenson, min. to England, No. 89, Feb. 20, 1841, S. Ex. Doc. 100, 32 Cong. 1 sess. 106, 108. Mr. Forsyth inclosed with his instruction a copy of the journal and proceedings of the house of assembly of Nova Scotia at its session of 1839-40.

<sup>b</sup> Mr. Stevenson, min. to England, to Lord Palmerston, Sec. of State, March 27, 1841, S. Ex. Doc. 100, 32 Cong. 1 sess. 113.

<sup>c</sup> Sabine's Report on the Fisheries, 228, 229, 230.

<sup>d</sup> For. Rel, 1873, III. 284.

strait.<sup>a</sup> The subject, however, was dropped after the conclusion of the reciprocity treaty of 1854.

In 1870 Mr. Jackson, United States consul at Halifax, four years after the termination of that treaty, said: "It has been intimated that still further restrictions will be imposed upon our fishermen, and that an attempt will be made to exclude them from the Strait of Canso. . . . The Strait of Canso for more than a century has been open as a public highway to the vessels of all friendly nations."<sup>b</sup>

The question of the fisheries was again set temporarily at rest by the treaty of Washington of May 8, 1871.

The unratified treaty of February 15, 1888, contained the following clause: "Art. IX. Nothing in this treaty shall interrupt or affect the free navigation of the Strait of Canso by fishing vessels of the United States."<sup>c</sup>

### 3. RECIPROCITY TREATY, 1854.

#### § 165.

With a view to adjust the various questions that had arisen concerning the convention of 1818, the British Government in 1854 sent Lord Elgin to the United States on a special mission, and on June 5, 1854, he concluded with Mr. Marcy, who was then Secretary of State, a treaty in relation to the fisheries, and to commerce and navigation. By the first article of this treaty it was provided that, in addition to the liberty secured to the United States fishermen by the convention of October 20, 1818, of taking, curing, and drying fish on certain of the coasts of British North America, the inhabitants of the United States should have, in common with the subjects of His Britannic Majesty," the liberty to take fish of every kind, except shell-fish, on the seacoasts and shores, and in the bays, harbors, and creeks of Canada, New Brunswick, Nova Scotia, Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the coasts and shores of those colonies and the islands thereof, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish; provided that, in so doing, they do not interfere with the rights of private property, or with British fishermen in the peaceable use of any part of the said coast in their occupancy for the same purpose."

The liberty thus defined applied solely to the sea fishery. The salmon and shad fisheries, and all fisheries in rivers and the mouths of rivers, were expressly reserved for British fishermen.

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<sup>a</sup> Sabine's Report, 263, 287-290.

<sup>b</sup> For. Rel. 1870, 430.

<sup>c</sup> S. Ex. Doc. 113, 50 Cong. 1 sess. 135.

On the other hand, it was provided by the second article of the treaty, that British subjects should have, in common with the citizens of the United States, "the liberty to take fish of every kind, except shell-fish, on the eastern sea coasts and shores of the United States north of the 36th parallel of north latitude, and on the shores of the several islands thereunto adjacent, and in the bays, harbors, and creeks of the said sea coast and shores of the United States and of the said islands," on precisely the same conditions, including the reservation of the salmon, shad, and all river fisheries, as were made with respect to the reciprocal liberty secured to the American fishermen by the preceding article.<sup>a</sup>

By the third article of the treaty, provision was made for reciprocal free trade between the United States and the British colonies in North America in various articles, being the growth and produce of either country; and by the fourth article, certain stipulations were established as to the navigation of the River St. Lawrence and Lake Michigan, and the use of such Canadian canals as formed part of the water communication between the Great Lakes and the Atlantic Ocean.

**Termination of reciprocity treaty.** This treaty came into operation on March 16, 1855. It was terminated March 17, 1866, in accordance with a notice given by the United States in conformity with its provisions.<sup>b</sup> From 1866 to 1869 the Canadian government granted licenses to American fishing vessels, at first at the rate of 50 cents and finally at the rate of \$2 a ton for the enjoyment during each season of the same liberties as they had exercised under the reciprocity treaty.<sup>c</sup>

**Licenses.**  
**Dominion legislation.** In 1868, however, the Dominion Parliament passed an "act respecting fishing by foreign vessels," which was amended in 1870, and which practically reenacted, with increased stringency of regulations and penalties, the Nova Scotian statute of 1836.<sup>d</sup>

<sup>a</sup> For the proceedings of the commissioners who decided upon and denoted the reserved places under the treaty, see Moore, *Int. Arbitrations*, I. 426-494, where the awards are given. The maps are in the Department of State.

<sup>b</sup> *Dip. Cor.* 1865, I. 93, 184, 259. See, in this relation, a pamphlet entitled "Letter to the Hon. William H. Seward, Secretary of State, in answer to one from him on the resolution of the Senate as to the relations of the United States with the British provinces and the actual condition of the question of the fisheries," by E. H. Derby, January, 1867, Washington, 1867, 50 pp. with an appendix of 245 pp. containing a preliminary report on the reciprocity treaty of 1854.

<sup>c</sup> *Dip. Cor.* 1866, I. 235; Papers relating to the Treaty of Washington, VI. 286; Mr. Hunter, Acting Sec. of State, to Mr. Thornton, *Brit. min.*, June 12, 1868, MS. Notes to Gr. Br. XIV. 363.

<sup>d</sup> *For. Rel.* 1870, 408, 414.



In 1870 the system of granting licenses was discontinued,<sup>a</sup> and a copy of a letter addressed by the secretary of state for the colonies to the lords of the admiralty on April 12, 1866, defining the views of the British Government as to the construction of the convention of 1818, was communicated to the United States. In this letter it was said that Her Majesty's Government were clearly of the opinion that by the convention of 1818 the United States had "renounced the right of fishing, not only within three miles of the colonial shores, but within three miles of a line drawn across the mouth of any British bay or creek." But the question, What is a British bay or creek? was one that had been the occasion of difficulty in former times. The letter said:

"It is, therefore, at present the wish of Her Majesty's Government neither to concede nor for the present to enforce any rights which are in their nature open to any serious question. Even before the conclusion of the reciprocity treaty Her Majesty's Government had consented to forego the exercise of its strict right to exclude American fishermen from the Bay of Fundy, and they are of opinion that during the present season that right should not be exercised in the body of the Bay of Fundy, and that American fishermen should not be interfered with, either by notice or otherwise, unless they are found within three miles of the shore, or within three miles of a line drawn across the mouth of a bay or creek which is less than ten geographical miles in width, in conformity with the arrangement made with France in 1839. . . . Her Majesty's Government do not desire that the prohibition to enter British bays should be generally insisted on, except when there is reason to apprehend some substantial invasion of British rights. And in particular they do not desire American vessels to be prevented from navigating the Gut of Canso (from which Her Majesty's Government are advised they may lawfully be excluded), unless it shall appear that this permission is used to the injury of colonial fishermen, or for other improper objects."<sup>b</sup>

It appears that instructions were given in 1870 not to seize any vessel unless it were evident, and could be clearly proved, that the offense of fishing had been committed and the vessel itself captured within three miles of land.<sup>c</sup>

Instructions of  
1870.

<sup>a</sup> For. Rel. 1870, 408. See circular of Mr. Boutwell, Secretary of the Treasury, May 16, 1870, as to the discontinuance of licenses and the inshore fisheries, For. Rel. 1870, 411. See, also, Mr. Bayard, Sec. of State, to Mr. Fairchild, Sec. of Treasury, April 1, 1886, 159 MS. Dom. Let. 682.

<sup>b</sup> For. Rel. 1870, 419-420.

<sup>c</sup> Id. 421.

Government, the United States recognized in the tenor of these instructions "a generous spirit of amity."<sup>a</sup> But subsequently, during the same season, it was learned that the colonial authorities were asserting the right to exclude American fishermen from entering the ports of the Dominion, either for the purpose of obtaining bait or supplies or of transshipping their cargoes of fish under the system of bonded transit which had long been in existence.<sup>b</sup>

"During the conferences which preceded the negotiation of the convention of 1818, the British commissioners proposed to expressly exclude the fishermen of the United States from 'the privilege of carrying on trade with any of his Britannic Majesty's subjects residing within the limits assigned for their use;' and also that it should not be 'lawful for the vessels of the United States engaged in said fishery to have on board any goods, wares, or merchandise whatever, except such as may be necessary for the prosecution of their voyages to and from the said fishing grounds. And any vessel of the United States which shall contravene this regulation may be seized, condemned, and confiscated with her cargo.'

"This proposition, which is identical with the construction now put upon the language of the convention, was emphatically rejected by the American commissioners, and thereupon was abandoned by the British plenipotentiaries, and Article I, as it stands in the convention, was substituted."

President Grant, Second Annual Message, Dec. 5, 1870.

This article is criticised by Pomeroy, in an article on the Northeastern Fisheries, *Am. Law Rev. V.* (1870-71), 412 et seq.

The allusion made by President Grant to the negotiations of the convention of 1818 refers to the exchange of certain propositions, leading up to the conclusion of the convention. In the article first proposed by the American plenipotentiaries on September 17, 1818, the renuncia-

<sup>a</sup> For. Rel. 1870, 421-422.

<sup>b</sup> For. Rel. 1870, 422-434. "Information furnished by various United States consuls in Canada shows that for a number of years past our fishing vessels have been permitted to carry merchandise, enter at the custom-houses, and buy supplies other than wood and water, but that this practice has recently been stopped." (Article by Prof. Pomeroy on the Northeastern Fisheries, *Am. Law Rev.* 1870-71, V. 389, 411, citing II. Ex. Doc. 1, 41 Cong. 3 sess. 422-434.)

"Anticipating that an attempt may possibly be made by the Canadian authorities in the coming season to repeat their unneighborly acts toward our fishermen, I recommend you to confer upon the Executive the power to suspend, by proclamation, the operation of the laws authorizing the transit of goods, wares, and merchandise in bond across the territory of the United States to Canada; and, further, should such an extreme measure become necessary, to suspend the operation of any laws whereby the vessels of the Dominion of Canada are permitted to enter the waters of the United States." (President Grant, Second Annual Message, 1870.)

tion of the right to fish within three marine miles of the coasts, bays, creeks, and harbors, was followed by the proviso that the American fishermen should be permitted to enter those places "for the purpose only of obtaining shelter, wood, water, and bait, but under such restrictions as may be necessary to prevent their drying or curing fish therein, or in any other manner abusing the privilege hereby reserved to them." The British plenipotentiaries on October 6 presented a counter project, in which, after stipulating that United States fishing vessels should have the liberty to enter bays and harbors "for the purpose of shelter or of repairing damages therein, and of purchasing wood and obtaining water, and for no other purpose," and that "all vessels so resorting to the said bays and harbors" should be "under such restrictions as may be necessary to prevent their taking, drying, and curing fish therein," they proposed to declare that it was "further well understood" that the "liberty of taking, drying, and curing fish" inshore, where it was granted by the article, should "not be construed to extend to any privilege of carrying on trade with any of His Britannic Majesty's subjects residing within the limits hereinbefore assigned to the use of the fishermen of the United States for any of the purposes aforesaid;" that, in order the more effectually to guard against smuggling, it should "not be lawful for the vessels of the United States engaged in the said fishery to have on board any goods, wares, or merchandise whatever, except such as may be necessary for the prosecution of their voyages to and from the said fishing grounds," and that any United States vessel which contravened this regulation might be seized, condemned, and confiscated, together with her cargo. On the 7th day of October the American plenipotentiaries replied that, whatever extent of fishing ground might be secured to American fishermen, they were not prepared to accept it on a tenure or on conditions different from those on which the whole had previously been held, and that making vessels liable to confiscation, in case any articles not wanted for carrying on the fishery should be found on board, would expose the fishermen to endless vexations. The British plenipotentiaries, in turn, on October 13, presented a draft of an article which was accepted by the American plenipotentiaries, and which was textually embodied in the first article of the convention. It differs little, so far as the present discussion is concerned, from the article submitted by the American plenipotentiaries on the 17th of September, except in the omission of the word "bait." The United States subsequently contended that the "bait" referred to was bait for cod, which was then caught in the waters in question, and that it was not intended to prevent the purchase in British ports of bait for the mackerel fishery, which did not begin in those waters till several years afterward. (Papers relating to the Treaty of Washington, VI. 280-282.)

"The right of our fishermen under the treaty of 1818 did not extend to the procurement of distinctive fishery supplies in Canadian ports and harbors; and one item supposed to be essential, to wit, bait, was plainly denied them by the explicit and definite words of the treaty of 1818, emphasized by the course of the negotiation and express decisions which preceded the conclusion of that treaty." (Message of President Cleveland to the Senate, Feb. 20, 1888, S. Ex. Doc. 113, 50 Cong. 1 sess. 130.)

November 25, 1870, the American fishing vessel *White Fawn* was seized at Head Harbor, New Brunswick, for having obtained there a quantity of herrings to be used as bait for fishing. She was taken to St. John, where she was afterwards libelled for forfeiture. Judgment was rendered by Judge Hazen, in the vice-admiralty court. He cited, first, the Imperial statute, 59 Geo. III. cap. 38, which declared that if any foreign vessel, or person on board thereof, "shall be found to be fishing, or to have been fishing, or preparing to fish within, such distance [three marine miles] of the coast, such vessel and cargo shall be forfeited:" and also the Dominion statute of 1868 (31 Vic. c. 61), as amended by the statute of 1870 (33 Vic. c. 15), which enacts: "If such foreign vessel is found fishing, or preparing to fish, or to have been fishing in British waters, within three marine miles of the coast, such vessel, her tackle, etc., and cargo, shall be forfeited." With reference to these statutes Judge Hazen said: "I think, before a forfeiture could be incurred, it must be shown that the preparations were for an illegal fishing in British waters. . . . The construction sought to be put upon the statutes by the Crown officers would appear to be thus: 'A foreign vessel, being in British waters and purchasing from a British subject any article which may be used in prosecuting the fisheries, without its being shown that such article is to be used in illegal fishing in British waters, is liable to forfeiture as preparing to fish in British waters.' I cannot adopt such a construction. I think it harsh and unreasonable and not warranted by the words of the statutes. It would subject a foreign vessel, which might be of great value, as in the present case, to forfeiture, with her cargo and outfits, for purchasing (while she was pursuing her voyage in British waters, as she lawfully might do, within three miles of our coast) of a British subject any article, however small its value (a cod line or net, for instance), without its being shown that there was any intention of using such articles in illegal fishing in British waters before she reached the fishing ground to which she might legally resort for fishing under the terms of the statutes. I construe the statutes simply thus: If a foreign vessel is found, 1st, having taken fish; 2d, fishing, although no fish have been taken; 3d, preparing to fish, *i. e.*, with her crew arranging her nets, lines, and fishing tackle for fishing, though not actually applied to fishing, in British waters, in either of those cases specified in the statutes the forfeiture attaches. I think the words 'preparing to fish' were introduced for the purpose of preventing the escape of a foreign vessel which, though, with intent of illegal fishing in British waters, had not taken fish or engaged in fishing by setting nets and lines, but was seized in the very act of putting out her lines, nets, etc., into the water, and so preparing to fish. . . . Taking this view of the statutes, I am of the opinion that

the facts disclosed by the affidavits do not furnish legal grounds for the seizure . . . and do not make out a *prima facie* case for condemnation. . . . I may add that as the construction I have put upon the statutè differs from that adopted by the Crown officers of the Dominion, it is satisfactory to know that the judgment of the Supreme Court may be obtained by information, filed there."

Documents and Proceedings of the Halifax Commission, III. 3381.

It does not appear that further action in the case was taken.

In June, 1870, the American fishing vessel *J. H. Nickerson* was seized in the North Bay of Ingonish, Cape Breton, on the charge of having entered to procure bait and of having procured or purchased it. She was libelled in the vice-admiralty court at Halifax for forfeiture, the libel setting out the imperial acts of 1819 and 1867 and the Dominion statutes of 1868 and 1870. Judgment was delivered by Sir William Young November 15, 1871. After reciting the facts and commenting upon the circumstance that the case had, by reason of the conclusion of the treaty of Washington of May 8, 1871, "lost much of its importance," he quoted the convention of 1818, and said: "The defendants allege that the *Nickerson* entered the Bay of Ingonish and anchored within three marine miles of the shore for the purpose of obtaining water and taking off two of her men who had friends on shore, neither the master nor the crew on board thereof, in the words of the responsive allegation, 'fishing, preparing to fish, nor procuring bait wherewith to fish, nor having been fishing in British waters within three marine miles of the coast.' Had this been proved, it would have been a complete defense, nor would the court have been disposed to narrow it as respects either water, provisions or wood. But the evidence conclusively shows that the allegation put in is untrue. The defendants have not claimed in their plea what their counsel claimed at the hearing, and their evidence has utterly failed them. The vessel went in, not to obtain water or men, as the allegation says, nor to obtain water and provisions, as their witness says; but to purchase or procure bait (which, as I take it, is a preparing to fish), and it was contended that they had a right to do so, and that no forfeiture accrued on such entering. The answer is, that if a privilege to enter our harbors for bait was to be conceded to American fishermen, it ought to have been in the treaty, and it is too important a matter to have been accidentally overlooked. We know, indeed, from the state papers that it was not overlooked,—that it was suggested and declined. But the court, as I have already intimated, does not insist upon that as a reason for its judgment. What may be justly and fairly insisted on is that beyond the four purposes specified in the treaty—shelter, repairs, water and wood,—here is another purpose or claim not specified; while the treaty itself declares

that no such other purpose or claim shall be received to justify an entry. It appears to me an inevitable conclusion that the 'J. H. Nickerson,' in entering the Bay of Ingonish for the purpose of procuring bait, and evincing that purpose by purchasing or procuring bait while there, became liable to forfeiture, and upon the true construction of the treaty and acts of Parliament, was legally seized. I direct, therefore, the usual decree to be filed for condemnation of vessel and cargo, and for distribution of the proceeds according to the Dominion act of 1871."

Extract from the *Halifax Daily Reporter and Times*, Nov. 15, 1871.  
Documents and Proceedings of the Halifax Commission, III. 3395-3398.

"The right to enter Canadian 'bays or harbors for the purpose of shelter and of repairing damages therein' includes in itself the right to procure whatever supplies are necessary for the successful continuance of the voyage. The statute 3 and 4 Vict., c. 65, s. 6, gives the admiralty court jurisdiction to decide 'all claims and demands whatsoever . . . for necessaries supplied to any foreign ship or sea-going vessel.' In *The Riga* (L. R. 3 Ad. and Ec. 516, 522), Sir R. Phillimore said: 'I am unable to draw any solid distinction (especially since the last statute) between necessaries for the ship and necessaries for the voyage. . . . I am of opinion that whatever is fit and proper for the service on which a vessel is engaged, whatever the owner of that vessel, as a prudent man, would have ordered if present at the time, comes within the meaning of the term "necessaries" as applied to those repairs done or things provided for the ship by order of the master, for which the owners are liable.' Under this ruling obtaining supplies necessary for the continuance of the voyage would be obtaining 'necessaries,' and, *a fortiori*, 'repairing damages.' See remarks of Chambre, J., in *Fennings v. Grenville*, 1 Taunt. 248."

Note of Dr. Wharton, *Int. Law Dig.* 2d ed. III. 52, § 304. He also added:

"Careful search has failed to supply a single case in which British courts have sustained the confiscation of American fishing vessels on the ground of purchase of supplies in Canadian ports. Yet, as is shown in the proceedings of the Halifax commission, the running, by American fishing vessels, into Canadian ports to obtain supplies has been in conformity with ancient usage; a usage which still continues; and this usage is recognized in the Canadian adjudications."

"Almost the very last witness we had on the stand told your honors that before the reciprocity treaty was made we were buying bait in Newfoundland, and several witnesses from time to time have stated that it is a very ancient practice for us to buy bait and supplies and to trade with the people along the shore, not in merchandise as merchants, but to buy supplies of bait and pay the sellers in money or trade, as might be most convenient. Now, that is one of those

natural trades that grow up in all countries; it is older than any treaty; it is older than civilized states or statutes. Fisheries have but one history. As soon as there are places peopled with inhabitants fishermen go there." (Mr. Dana, Halifax Com. II. 1573.)

#### 4. TREATY OF WASHINGTON, 1871.

#### § 166.

When the Joint High Commission, which negotiated the treaty of Washington, met on February 27, 1871, the dispute as to the fisheries was one of the subjects that had been placed within its cognizance.

The British commissioners were instructed that the two chief questions were: "As to whether the expression 'three marine miles of any of the coasts, bays, creeks, or harbors of his Britannic Majesty's dominions' should be taken to mean a limit of three miles from the coast line, or a limit of three miles from a line drawn from headland to headland; and whether the proviso that 'the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter, and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever,' is intended to exclude American vessels from coming inshore to traffic, transship fish, purchase stores, hire seamen, etc." While a preference was expressed for the conclusion of a definite understanding upon the disputed interpretation of the convention of 1818, the British commissioners were authorized to propose that "the whole question of the relations between the United States and the British possessions in North America, as regards the fisheries," should be "referred for consideration and inquiry to an international commission, on which two commissioners, to be hereafter appointed, in consultation with the government of the Dominion, should be the British representatives." As it was not probable that such a commission would be able to report, and that a treaty could be framed, before the commencement of the fishing season of 1871, the British commissioners were authorized to agree upon some means, by licenses or otherwise, by which disputes might in the meantime be avoided.<sup>a</sup>

In the instructions to the American commissioners, the following grounds were taken:

**Instructions of American commissioners.** 1. That the acquisition of the inshore fisheries for the American fishermen was of more importance as removing danger of collision than on account of its money value, the latter, probably, being overestimated by the Canadians.

<sup>a</sup> Lord Granville to Her Majesty's High Commissioners, February 9, 1871. (Papers relating to the Treaty of Washington, VI. 373-374.)

2. That the headland doctrine had no foundation in the convention of 1818, and had been decided against Great Britain in the case of the schooner *Washington*, under the claims convention of February 5, 1853.

3. That the assumption to prevent American fishermen from purchasing bait, supplies, ice, etc., and from transshipping their fish in bond, under color of the convention of 1818, was never acquiesced in by the United States, and was carrying out in practice provisions which the American plenipotentiaries declined to insert in that convention.

4. That as the mackerel fishery, out of which the trouble mostly arose, had come into existence since 1818, it was a subject for consideration whether the convention was fairly applicable to it.

For the adjustment of these questions it was suggested that provision might be made, either—

1. By agreeing on the terms upon which the whole of the reserved fishing grounds might be thrown open to American fishermen, all obnoxious laws to be repealed, and the disputed reservation as to ports, harbors, etc., to be abrogated; or,

2. By agreeing upon the construction of the disputed renunciation, and upon the principles on which a line should be run by a joint commission to mark the territory from which the American fishermen were to be excluded; and by repealing the obnoxious laws, and agreeing on the measures to be taken for the protection of the colonial rights, such measures to prescribe the penalties for the violation of those rights, and to provide for a mixed tribunal for their enforcement. It might also, said the American instructions, be well to consider whether it should be further agreed that the fish taken in the waters open to both nations should be admitted free of duty into the United States and the British North American colonies.<sup>a</sup>

The results of the deliberations of the Joint High Commission on the subject of the fisheries were embodied in certain articles of the treaty concluded at Washington May 8, 1871.<sup>b</sup>

By Article XVIII. it was provided that, in addition to the liberty secured by the convention of 1818 of taking, drying, and curing fish on certain coasts of the British North American colonies, the inhabitants of the United States should have, in common with the subjects of Her Britannic Majesty, the liberty, for the term of years mentioned in Article

<sup>a</sup> Papers relating to the Treaty of Washington, VI. 287-288.

<sup>b</sup> For the deliberations of the Joint High Commission on this subject, see Moore, *Int. Arbitrations*, I. 716-719.



**XXXIII.**<sup>a</sup> of the treaty, "to take fish of every kind, except shell-fish, on the sea-coasts and shores, and in the bays, harbors and creeks, of the Provinces of Quebec, Nova Scotia, and New Brunswick, and the colony of Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the said coasts and shores and islands, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish; provided that, in so doing, they do not interfere with the rights of private property, or with British fishermen, in the peaceable use of any part of the said coasts in their occupancy for the same purpose." And it was provided that the liberty thus defined applied solely to the sea fishery, and that the salmon and shad fisheries, and all other fisheries in rivers and the mouths of rivers, were reserved exclusively for British fishermen.

On the other hand, it was agreed by Article XIX. that British subjects should have, in common with the citizens of the United States, and subject to such terms, conditions, and limitations as were expressed in the preceding article, the liberty to take fish, and to land for the purpose of drying nets and curing fish, on the eastern seacoast and shores of the United States north of the thirty-ninth parallel of north latitude, and on the shores of the adjacent islands, and in the bays, harbors, and creeks of such seacoasts and islands.

By Article XX. it was provided that the places designated by the commissioners appointed under Article I. of the reciprocity treaty of June 5, 1854, upon the coasts of the two countries, as places reserved from the common right of fishing under that treaty, should in like manner be regarded as reserved from the common right of fishing under the present article; and that, in case any question should arise as to the common right of fishing in places not thus designated as reserved, a commission should be appointed to designate such places, in precisely the same manner as under the treaty of 1854.

In addition to these stipulations, it was agreed by Article XXI. **Free admission of fish and fish oil.** that, for the term of years mentioned in Article XXXIII. of the treaty, "fish-oil and fish of all kinds, (except fish of the inland lakes, and of the rivers falling into them, and except fish preserved in oil,) being the produce of the fisheries of the United States, or of the Dominion of Canada, or of

<sup>a</sup> This article provided that Articles XVIII. to XXV., inclusive, and Article XXX. should go into operation as soon as the necessary laws should have been passed to give them effect, and remain in force for ten years thereafter, and further until the expiration of two years after either party should have notified the other of its wish to terminate them, each party being at liberty to give such notice at the end of the period of ten years or at any time afterward.

Prince Edward's Island," should "be admitted into each country, respectively, free of duty."

It being asserted by Great Britain, but not admitted by the United States, that the privileges accorded to the citizens of the United States under Article XVIII. of the treaty were of greater value than those accorded to British subjects under Articles XIX. and XXI., it was provided by Article XXII. that commissioners should "be appointed to determine, having regard to the privileges accorded by the United States to the subjects of Her Britannic Majesty, as stated in Articles XIX. and XXI. of this treaty, the amount of any compensation which, in their opinion, ought to be paid by the Government of the United States to the Government of Her Britannic Majesty in return for the privileges accorded to the citizens of the United States under Article XVIII. of this treaty." It was agreed that any sum of money which the commissioners might so award should be paid by the United States in a gross sum, within twelve months after such award should have been given.

By Article XXXII. of the treaty it was agreed that the stipulations of Articles XVIII. and XXV., inclusive, should extend to the colony of Newfoundland, so far as they were applicable; but that if the Imperial Parliament, the legislature of Newfoundland, or the Congress of the United States should not embrace that colony in the laws passed to give those articles effect, then the article (XXXII.) should be of no effect.<sup>a</sup>

To a proposal of the Government of Newfoundland that American fishermen should be admitted to the right of taking seals within the territorial jurisdiction of Newfoundland in return for the free admission into the United States of the products of the Newfoundland seal fishery, the Department of State replied that such a measure would require the sanction of Congress, and that it was not considered probable that the assent of that body would be given.<sup>b</sup>

British Columbia fisheries products were not entitled to free entry into the United States under the treaty of 1871.<sup>c</sup>

Acts in relation to the fishery articles were passed by the Imperial Parliament and by Canada and Prince Edward Island.<sup>d</sup> These acts

<sup>a</sup> As to certain provisional proposals, pending the adoption of legislation to carry into effect the fisheries clauses, see Moore, *Int. Arbitrations*, I. 722; *For. Rel.* 1871, 485-492; 1872, I. 215-222.

<sup>b</sup> Mr. Fish, Sec. of State, to Sir E. Thornton, *Brit. min.* June 25, 1873, MS. Notes to Gr. Br. XVI. 130. As to the Newfoundland fisheries, see *Rev. des Deux-Mondes*, XVI. (Nov. 1874), and 29 *Hunt's Merch. Mag.* 420.

<sup>c</sup> 66 Br. and For. State Papers, 968-969. As to the rights of nations over sea fisheries, see H. Report 7, 46 Cong. 1 sess.

<sup>d</sup> *For. Rel.* 1873, I. 402, 403, 407.

were to take effect at a time to be appointed by proclamation, in order that the beginning of their operation might be simultaneous with that of the legislation to be enacted by the United States. The corresponding legislation on the part of the United States was adopted on March 1, 1873, to take effect on the 1st of the following July, the beginning of the new fiscal year.<sup>a</sup> On the 3d of March, 1873, the committee of the privy council of Canada recommended that, pending the coming into force of the United States act, American vessels should not be prevented from fishing within the three-mile limit.<sup>b</sup> On the 7th of June, 1873, Mr. Fish and Sir Edward Thornton signed at Washington a protocol in which, after reciting the reciprocal legislation on the subject, they declared that the fishery articles would take effect on the 1st of the following July.<sup>c</sup> The colony of Newfoundland, having passed the necessary laws, was admitted to the benefits of the treaty and the act of Congress on the 1st of June, 1874.<sup>d</sup>

The question of the amount of the compensation, if any, to be paid to Great Britain in return for the fisheries privileges:  
**Halifax award.** accorded to the citizens of the United States under the treaty of 1871 was determined by the commission at Halifax, in 1877.<sup>e</sup> The aggregate amount claimed for the twelve years during which the treaty was certainly to remain in force was \$14,880,000, or \$1,240,000 per annum. Of this amount the sum of \$2,880,000 was claimed on account of Newfoundland.<sup>f</sup> The commission by a vote of two to one, the American commissioner dissenting, awarded Nov. 23, 1877, the total sum of \$5,500,000 in gold, which, after some discussion, was duly paid.<sup>g</sup>

During the taking of proofs in support of the British case at Halifax, in 1877, it became evident that a large part  
**Commercial priv- illeges.** of the British claim was based on the alleged advantages of a commercial character. Mr. Foster, the agent of the United States, took the ground that these advantages, whether valu-

<sup>a</sup> 17 Stat. at L. 482.

<sup>b</sup> For. Rel. 1873, I. 418-419.

<sup>c</sup> Treaties and Conventions, 1776-1887, 498.

<sup>d</sup> Treaties and Conventions, 1776-1887, 499; For. Rel. 1873, I. 419, 427, 429; 1874, 554, 557, 558, 559. All of Labrador, outside the province of Quebec, came into the arrangement as part of the colony of Newfoundland. (For. Rel. 1874, 507, 572, 573; 1875, I. 643.)

<sup>e</sup> Moore, International Arbitrations, I. 725 et seq. As to the attempt to supersede the necessity of an arbitration by a new reciprocity arrangement, see id. 724-725. As to Mr. Delfosse, the third commissioner, see id. 725-727, 746-747.

<sup>f</sup> As to the privileges covered by these claims, and the answer of the United States, see Moore, International Arbitrations, I. 732-735, 736-743.

<sup>g</sup> Moore, Int. Arbitrations, I. 745-753. See, also, S. Ex. Doc. 44, 45 Cong. 2 sess.; S. Ex. Doc. 100, 45 Cong. 2 sess.; H. Ex. Doc. 89, 45 Cong. 2 sess.; S. Rep. 439, 45 Cong. 2 sess.; S. Mis. Doc. 73, 45 Cong. 2 sess.

able or not, were not secured to the citizens of the United States by the articles of the treaty of Washington. He therefore, on the 1st of September, submitted to the commission the following motion :

"The counsel and agent of the United States ask the honorable commissioners to rule and declare that it is not competent for this commission to award any compensation for commercial intercourse between the two countries, and that the advantages resulting from the practice of purchasing bait, ice, supplies, etc., and from being allowed to transship cargoes in British waters, do not constitute good foundation for an award of compensation, and shall be wholly excluded from the consideration of this tribunal."

In support of this motion Mr. Foster contended that by Article XXII. of the treaty of Washington the question before the commission was the amount of any compensation which ought to be paid by the United States for the privileges secured to their citizens under Article XVIII. of the treaty of Washington. By that article the privileges secured to the citizens of the United States were the liberty of inshore fishing and that of landing on uninhabited and desert coasts for the purpose of drying nets and curing fish. These were, he maintained, the sole concessions to which the jurisdiction of the commission extended. All other questions, such as the purchase of bait, ice, and supplies, the conduct of commercial intercourse, and alleged damages to British fisheries, were beyond the commission's cognizance. The treaty of Washington conferred no such privileges on the inhabitants of the United States, who enjoyed them merely by sufferance, and could at any time be deprived of them by the enforcement of existing laws or the reenactment of former oppressive statutes.<sup>a</sup>

Counsel for Great Britain, in reply, maintained that the privileges in question were embraced in and incidental to the grant under Article XVIII. of the treaty of Washington. By Article I. of the convention of 1818, the American fishermen were, he said, permitted to enter British waters for four specified purposes, and "for no other purpose whatever." The object of the treaty of Washington was to do away altogether with these restrictions and to place the American fishermen on the same footing as the British fishermen in respect of the inshore fisheries. According to the argument of Mr. Foster, said British counsel, if an American fisherman landed for the purpose of obtaining a barrel of flour in exchange for fish, or of purchasing bait, or of obtaining a gallon or two of kerosene oil, he would be subject to punishment and render his vessel liable to forfeiture.<sup>b</sup>

<sup>a</sup> Documents and Proceedings of the Halifax Commission, II. 1539 et seq.

<sup>b</sup> Documents and Proceedings of the Halifax Commission, II. 1547-1557. Other counsel took part in the discussion. (Id. 1557-1570.)

The argument on Mr. Foster's motion was closed on the part of the United States by Mr. Dana. He contended that American fishermen possessed by comity the right to run into British ports and buy bait and other necessities, unless they were specially excluded on some proper ground. Great Britain might regulate their entry, require them to report at the custom-house and be searched in order to see whether they were merchants in disguise, and levy duties upon them. But, in the absence of a prohibition, there was no right to prevent fishermen from buying bait and supplies; and he maintained that there was no law preventing the exercise by American fishermen of the privileges in question.

On the 6th of September the commission unanimously rendered the following decision:

"The commission having considered the motion submitted by the agent of the United States at the conference held on the 1st instant, decide:

"That it is not within the competence of this tribunal to award compensation for commercial intercourse between the two countries, nor for purchasing bait, ice, supplies, etc., nor for the permission to transship cargoes in British waters."

After this decision was read, Sir Alexander Galt, the British commissioner, stated the grounds on which he acquiesced in it. He did not think that counsel for the United States had correctly stated the position of the two parties at the time when the treaty of Washington was entered into. The impression left on his mind by an examination of the treaty was, said Sir Alexander, that it must necessarily have been supposed that, as in the case of the reciprocity treaty, so in the case of the Washington treaty, the rights of traffic and of obtaining bait and supplies were conferred, being incidental to the fishing privilege. He therefore believed that it was the intention of the parties to the treaty of Washington to direct the tribunal to consider all the points relating to the fisheries which had been set forth in the British case; but he was now met by the most authoritative statement as to what the parties to the treaty intended. The agent of the United States had distinctly stated that it was not the intention of his Government to provide by the treaty for the continuance of those incidental privileges, and that the United States were prepared to take the whole responsibility and to run all the risk of the reenactment of the vexatious statutes to which reference had been made. From this argument as to the true, rigid, and strict interpretation of the treaty of Washington, he "could not escape." The responsibility must rest upon those who appealed to the strict words of the treaty as their justification.<sup>a</sup>

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<sup>a</sup> Documents and Proceedings of the Halifax Commission, II. 1585-1588.

Accompanying the answer of the United States before the Halifax commission, there was a "Brief for the United States upon the Question of the Extent and Limits of the Inshore Fisheries and Territorial Waters on the Atlantic Coast of British North America." In this brief the discussions between the two Governments subsequent to the convention of 1818 are reviewed, and various writers on international law are cited, and it is maintained "that, prior to the treaty of Washington, the fishermen of the United States, as well as those of all other nations, could rightfully fish in the open sea more than three miles from the coast; and could also fish at the same distance from the shore in all bays more than six miles in width, measured in a straight line from headland to headland." The brief cites, on the question of territorial waters, *Queen v. Keyn*, L. R. 2 Exch. Div. 63; Bluntschli, *Law of Nations*, book 4, §§ 302, 309; Klüber, *Droit des Gens Modernes de l'Europe*, Paris, 1831, vol. 1, p. 216; Ortolan, *Diplomatie de la Mer*, ed. 1864, pp. 145, 153; Hautefeuille, *Droits et Devoirs des Nations Neutres*, tom. 1, tit. 1, ch. 3, § 1; Manning's *Law of Nations*, by Amos; Martens, *Précis du Droit des Gens Modernes de l'Europe*, ed. 1864, Pinheiro-Ferreira, §§ 40, 41; De Cussy, *Phases et Causes Célèbres du Droit Maritime des Nations*, Leipzig, 1856, liv. 1, tit. 2, §§ 40, 41.<sup>a</sup>

The British representatives filed a brief in reply. In this brief it is declared to be "admitted by all authorities, whether writers on international law, judges who have interpreted that law, or statesmen who have negotiated upon or carried it into effect in treaties or conventions, that every nation has the right of exclusive dominion and jurisdiction over those portions of its adjacent waters which are included by promontories or headlands within its territories." On this proposition the brief cites Kent's *Com. I.* 32; Lawrence's *Wheaton* (1863), 320. The brief also maintains that by the convention of 1818 the United States fishermen are prohibited from fishing, not merely within three miles from the shore, but within three marine miles of the entrance of any of the bays, creeks, or harbors of His Britannic Majesty's dominions in America.<sup>b</sup> As to the meaning of the terms coasts, creeks, bays, and harbors, and the extent of marine jurisdiction, it cites Bee's *Adm. Rep.* 205; act of Congress, 3 Stats. at L. 136; *The Anna*, 5 Rob. 385; *United States v. Grush*, 5 Mason, 298; *United States v. Bevan*, 3 Wheat. 387; *Hargrave's Tracts*, chapter 4; *De Lovio v. Boit*, 2 Gallison, 2d ed., 426; *Church v. Hubbard*, 2 Cranch, 187; 1 Op. At. Gen. 32; *Martin v. Waddell*, 16 Pet. 367; *Life of Sir Leoline Jenkins*, II. 726; Azuni,

<sup>a</sup> Documents and Proceedings of the Halifax Commission, I. 119-167.

<sup>b</sup> *Id.* II. 1887-1908.

*Droit Maritime de l'Europe*, ch. II. art. 3, § 3; Pufendorf, b. 3, c. 5; Vattel, b. I. ch. 33; *Queen v. Keyn*, L. R. 2 Exch. Div. 63; *The Direct United States Cable Co. v. The Anglo-American Telegraph Co.*, L. R. 2 App. Cas. 394.

The British agent also filed certain "Official Correspondence from the Years 1827 to 1872, inclusive. Showing the Encroachments of United States Fishermen in British North American Waters since the Conclusion of the Convention of 1818."<sup>a</sup>

On Sunday, January 6, 1878, some American fishermen, while fishing in Fortune Bay, Newfoundland, were attacked **Fortune Bay case.** by a mob of natives, who expelled them and destroyed their boats and nets. The attack was due to local feeling caused by the fact that the American fishermen, under a claim that their privileges in the inshore fisheries under the treaty could not be abridged by local legislation, were availing themselves of an opportunity to take fish in the bay when the native fishermen were forbidden by the colonial law to carry on their operations. The United States minister in London was instructed to present a demand for damages amounting to \$105,305.02. The British Government took the ground that the treaty granted only a right to fish in common with Her Majesty's subjects, and that as the American fishermen, as their evidence disclosed, were, by the manner and time of their fishing on the occasion in question, violating the laws of Newfoundland, and thus overstepping the limits of their privilege, the United States could not complain of their having been driven away. The United States, while contending that the local law could not be admitted to define or limit the treaty privilege, also maintained that, independently of this question, compensation was due on account of the violence and irregularity of the acts complained of. Early in 1881 the claims were settled by the British Government's paying £15,000, which included compensaiton for certain injuries suffered by American fishermen at Aspee Bay.<sup>b</sup> The offer of indemnity was made by Earl Granville on condition of receiving from the United States an "assurance that it is accepted in full of all claims arising out of any interruption of American fishermen on the coast of Newfoundland and its dependencies up to the present time, and without prejudice to any question of the rights of either Government under the treaty of Washington."<sup>c</sup> To this Mr. Lowell, under instructions of Mr. Evarts, replied: "The assurance I may give is this: That the sum paid is accepted in full of all claims arising out of any interruptions

<sup>a</sup> Documents and Proceedings of the Halifax Commission. II. 1457-1508.

<sup>b</sup> II. Ex. Doc. 84. 46 Cong. 2 sess.; President Arthur, first annual message, Dec. 6, 1881.

<sup>c</sup> Earl Granville, for. sec., to Mr. Lowell, min. to England, Feb. 26, 1881, For. Rel. 1881, 509.

of American fishermen on the coasts of Newfoundland and its dependencies, up to this time presented to either Government, and without prejudice to any question of the rights of either Government under the treaty of Washington."<sup>a</sup>

By a joint resolution of Congress of March 3, 1883, the President was directed to give notice to the British Government of the termination of Articles XVIII. to XXV. inclusive, and of Article XXX. of the treaty of May 8, 1871, in accordance with its terms.<sup>b</sup> Notice was given accordingly, so that the articles expired on July 1, 1885; and it was agreed that Article XXXII., by which Newfoundland was admitted to the arrangement, ended with them.<sup>c</sup> Early in 1885 it was suggested by the British minister at Washington that, as inconvenience might be occasioned by the expiration of the articles in the midst of the fishing season, it might be desirable to come to an agreement under which they might in effect be extended till the 1st of January following. After consultation with leading Senators, Mr. Frelinghuysen advised the British minister that it was deemed impracticable at that late day to carry out the suggestion; and a Presidential proclamation was issued warning the American fishermen of the approaching expiration of the articles.<sup>d</sup>

March 12, 1885, the British minister embodied his suggestion in a memorandum, which he communicated with a personal letter to Mr. Bayard, who had succeeded Mr. Frelinghuysen as Secretary of State. Informal negotiations ensued, which were conducted on the part of Canada and Newfoundland by Sir Ambrose Shea. They resulted, June 22, 1885, in an arrangement by exchange of notes, and the results were embodied in a notice issued by Mr. Bayard as Secretary of State. In this notice it was announced that the privilege of in-shore fishing, which would otherwise have ended on the 1st of July, might continue throughout the season of 1885, and that the immunity thus accorded to American fishing vessels in British-American waters would likewise be extended to British vessels and subjects engaged

<sup>a</sup> Mr. Lowell, min. to England, to Earl Granville, for. sec., March 2, 1881. For. Rel. 1881, 509. See also Mr. Blaine, Sec. of State, to Mr. Lowell, min. to England, July 30, 1881. For. Rel. 1881, 544. For proposals as to the abrogation or suspension, in connection with the Fortune Bay case, of the fishery articles of the treaty of Washington, see S. Mis. Doc. 80, 45 Cong. 3 sess.: H. Report 1275, 46 Cong. 2 sess.; S. Ex. Doc. 180, 46 Cong. 2 sess.; H. Report 1746, 46 Cong. 2 sess.

<sup>b</sup> See report of Feb. 4, 1882, H. Report 235, 47 Cong. 1 sess.; 22 Stat. 641.

<sup>c</sup> For. Rel. 1883, 413, 435, 441, 451, 464; 1884, 214-215; 1885, 466.

<sup>d</sup> Mr. Frelinghuysen, Sec. of State, to Senator Edmunds, Jan. 15, 1885, 153 MS. Dom. Let. 661; Mr. Frelinghuysen, Sec. of State, to Mr. West, British min., Jan. 20, 1885, MS. Notes to Great Britain, XIX. 625.



in fishing in the waters of the United States. But, as the joint resolution of Congress had repealed the act of March 1, 1873, for the execution of the fishing articles, it was stated that the arrangement in no way affected the question of exemption from customs duties, as to which the abrogation of the fishing articles remained complete. It was added, however, that, as part of the arrangement, the President would bring the whole question of the fisheries before Congress at its next session and recommend the appointment of a joint commission to consider the matter, "in the interest of maintaining good neighborhood and friendly intercourse between the two countries, thus affording a prospect of negotiation for the development and extension of trade between the United States and British North America." Copies of the memoranda and exchanged notes on which the agreement rested were appended to the notice, and reference was also made to the President's proclamation of January 31, 1885, giving warning of the termination of the fishery articles.<sup>a</sup>

In his annual message of December 8, 1885, President Cleveland recommended that provision should be made for the appointment of a joint commission, such as was referred to in the arrangement. This recommendation was voted upon adversely by the Senate on April 13, 1886.<sup>b</sup> Negotiations were then instituted with a view to reach a joint interpretation of the convention of 1818, but they were unsuccessful, and President Cleveland, in his annual message of December 6, 1886, declared that, while he was desirous that mutually beneficial and friendly relations should exist between the American people and the inhabitants of Canada, the action of the Canadian officials during the past season toward American fishermen had been "such as to seriously threaten their continuance." He added, however, that, although he was disappointed in his efforts to secure a satisfactory settlement of the fishery question, negotiations were still pending, with reasonable hope that before the close of Congress an announcement might be made that an acceptable conclusion had been reached.<sup>c</sup>

<sup>a</sup> For. Rel. 1885, 460-469; message of President Cleveland of Jan. 12, 1886, S. Ex. Doc. 32, 49 Cong. 1 sess.

<sup>b</sup> See resolution of Senator Frye, Jan. 18, 1886, adverse to the appointment of a joint commission, S. Mis. Doc. 37, 49 Cong. 1 sess.; also, resolution reported by Mr. Frye from the Committee on Foreign Relations, Feb. 3, 1886, S. Mis. Doc. 59, 49 Cong. 1 sess.

<sup>c</sup> The message of July 24, 1886, gives seizures and détentions which had then taken place, S. Ex. Doc. 217, 49 Cong. 1 sess. See the message of Dec. 8, 1886, H. Ex. Doc. 19, 49 Cong. 2 sess., with a suggestion that a commission be authorized by law to take perpetuating proofs of losses sustained by American fishermen by reason of the action of the Canadian officials during the season then just past. See, also, letter of Mr. Manning, Secretary of the Treasury, to the Speaker of the House, on the fisheries question, H. Ex. Doc. 78, 49 Cong. 2 sess.

The principal questions at issue between the two Governments are disclosed in the correspondence which immediately follows.\*

#### 5. CONTROVERSIES OF 1886-1888.

##### § 167.

"On the 6th instant I received from the consul-general of the United States at Halifax a statement of the seizure of an American schooner, the *Joseph Story*, of Gloucester, Mass., by the authorities at Baddeck, Cape Breton, and her discharge after a detention of twenty-four hours.

"On Saturday, the 8th instant, I received a telegram from the same official, announcing the seizure of the American schooner *David J. Adams*, of Gloucester, Mass., in the Annapolis Basin, Nova Scotia, and that the vessel had been placed in the custody of an officer of the Canadian steamer *Lansdowne*, and sent to St. John, New Brunswick, for trial.

"As both of these seizures took place in closely landlocked harbors, no invasion of the territorial waters of the British provinces, with the view of fishing there, could well be imagined; and yet the arrests appear to have been based upon the act or intent of fishing within waters as to which, under the provisions of the treaty of 1818 between Great Britain and the United States of America, the liberty of the inhabitants of the United States to fish has been renounced.

"It would be superfluous for me to dwell upon the desire which, I am sure, controls those respectively charged with the administration of the Governments of Great Britain and of the United States to prevent occurrences tending to create exasperation, or unneighborly feeling, or collision between the inhabitants of the two countries; but, animated with this sentiment, the time seems opportune for me to submit some views for your consideration, which I confidently hope will lead to such administration of the laws regulating the commercial interests and the mercantile marine of the two countries as may promote good feeling and mutual advantage, and prevent hostility to commerce under the guise of protection to inshore fisheries.

"The treaty of 1818 is between two nations, the United States of America and Great Britain, who, as the contracting parties, can alone apply authoritative interpretation thereto, or enforce its provisions by appropriate legislation.

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\* See, also, the following Canadian documents: Correspondence relative to the Fisheries Question, 1885-1887, presented to the Canadian Parliament, May 3, 1887; Annual Report of the Department of Fisheries, Dominion of Canada, for the year 1886; Special Report on the Fisheries Protection Service of Canada, 1886.

" The discussion prior to the conclusion of the treaty of Washington in 1871 was productive of a substantial agreement between the two countries as to the existence and limit of the three marine miles within the line of which, upon the regions defined in the treaty of 1818, it should not be lawful for American fishermen to take, dry, or cure fish. There is no hesitancy upon the part of the Government of the United States to proclaim such inhibition and warn their citizens against the infraction of the treaty in that regard, so that such inshore fishing cannot lawfully be enjoyed by an American vessel being within three marine miles of the land.

" But since the date of the treaty of 1818, a series of laws and regulations importantly affecting the trade between the North American provinces of Great Britain and the United States have been, respectively, adopted by the two countries, and have led to amicable and mutually beneficial relations between their respective inhabitants.

" This independent and yet concurrent action by the two Governments has effected a gradual extension, from time to time, of the provisions of Article I. of the convention of July 3, 1815, providing for reciprocal liberty of commerce between the United States and the territories of Great Britain in Europe, so as gradually to include the colonial possessions of Great Britain in North America and the West Indies within the results of that treaty.

" President Jackson's proclamation of October 5, 1830, created a reciprocal commercial intercourse, on terms of perfect equality of flag, between this country and the British American dependencies, by repealing the navigation acts of April 18, 1818, May 15, 1820, and March 1, 1823, and admitting British vessels and their cargoes 'to an entry in the ports of the United States from the islands, provinces, and colonies of Great Britain on or near the American continent, and north or east of the United States.' These commercial privileges have since received a large extension in the interests of propinquity, and in some cases favors have been granted by the United States without equivalent concession. Of the latter class is the exemption granted by the shipping act of June 26, 1884, amounting to one-half of the regular tonnage dues on all vessels from the British North American and West Indian possessions entering ports of the United States. Of the reciprocal class are the arrangements for transit of goods, and the remission, by proclamation, as to certain British ports and places of the remainder of the tonnage tax, on evidence of equal treatment being shown to our vessels.

" On the other side, British and colonial legislation, as notably in the case of the imperial shipping and navigation act of June 26, 1849, has contributed its share toward building up an intimate intercourse and beneficial traffic between the two countries founded on mutual interest and convenience.

"These arrangements, so far as the United States are concerned, depend upon municipal statute and upon the discretionary power of the Executive thereunder.

"The seizure of the vessels I have mentioned, and certain publications purporting to have been issued by the colonial authorities, would appear to have been made under a supposed delegation of jurisdiction by the Imperial Government of Great Britain, and to be intended to include authority to interpret and enforce the provisions of the treaty of 1818, to which, as I have remarked, the United States and Great Britain are the contracting parties, who can alone deal responsibly with questions arising thereunder.

"The effect of this colonial legislation and Executive interpretation if executed according to the letter, would be not only to expand the restrictions and renunciations of the treaty of 1818, which relate solely to inshore fishery within the three-mile limit, so as to affect the deep-sea fisheries, the right to which remained unquestioned and unimpaired for the enjoyment of the citizens of the United States, but further to diminish and practically to destroy the privilege expressly secured to American fishing vessels to visit those inshore waters for the objects of shelter, repair of damages, and purchasing wood, and obtaining water.

"Since 1818, certain important changes have taken place in fishing in the regions in question, which have materially modified the conditions under which the business of inshore fishing is conducted and which must have great weight in any present administration of the treaty.

"Drying and curing fish, for which a use of the adjacent shore was at one time requisite, is now no longer followed, and modern invention of processes of artificial freezing, and the employment of vessels of a larger size, permit the catch and direct transportation of fish to the markets of the United States without recourse to the shore contiguous to the fishing grounds.

"The mode of taking fish inshore has also been wholly changed, and from the highest authority on such subjects I learn that bait is no longer needed for such fishing, that purse-seines have been substituted for the other methods of taking mackerel, and that by their employment these fish are now readily caught in deeper waters entirely exterior to the three-mile line.

"As it is admitted that the deep-sea fishing was not under consideration in the negotiation of the treaty of 1818, nor was affected thereby, and as the use of bait for inshore fishing has passed wholly into disuse, the reasons which may have formerly existed for refusing to permit American fishermen to catch or procure bait within the line of a marine league from the shore, lest they should also use it in the

same inhibited waters for the purpose of catching other fish, no longer exist.

"For it will, I believe, be conceded as a fact that bait is no longer needed to catch herring or mackerel, which are the objects of inshore fishing, but is used, and only used, in deep-sea fishing, and, therefore, to prevent the purchase of bait or any other supply needed in deep-sea fishing, under color of executing the provisions of the treaty of 1818, would be to expand that convention to objects wholly beyond its purview, scope, and intent, and give to it an effect never contemplated by either party, and accompanied by results unjust and injurious to the citizens of the United States.

"As, therefore, there is no longer any inducement for American fishermen to 'dry and cure' fish on the interdicted coasts of the Canadian provinces, and as bait is no longer used or needed by them [for the prosecution of inshore fishing] in order to 'take' fish in the inshore waters to which the treaty of 1818 alone relates, I ask you to consider the results of excluding American vessels, duly possessed of permits from their own Government to touch and trade at Canadian ports as well as to engage in deep-sea fishing, from exercising freely the same customary and reasonable rights and privileges of trade in the ports of the British colonies as are freely allowed to British vessels in all the ports of the United States under the laws and regulations to which I have adverted.

"Among these customary rights and privileges may be enumerated the purchase of ship-supplies of every nature, making repairs, the shipment of crews in whole or part, and the purchase of ice and bait for use in deep-sea fishing.

"Concurrently, these usual rational and convenient privileges are freely extended to and are fully enjoyed by the Canadian merchant marine of all occupations, including fishermen in the ports of the United States.

"The question therefore arises whether such a construction is admissible as would convert the treaty of 1818 from being an instrumentality for the protection of the inshore fisheries along the described parts of the British American coast into a pretext or means of obstructing the business of deep-sea fishing by citizens of the United States, and of interrupting and destroying the commercial intercourse that since the treaty of 1818, and independent of any treaty whatever, has grown up and now exists under the concurrent and friendly laws and mercantile regulations of the respective countries.

"I may recall to your attention the fact that a proposition to exclude the vessels of the United States engaged in fishing from carrying also merchandise was made by the British negotiators of the

treaty of 1818, but being resisted by the American negotiators was abandoned. This fact would seem clearly to indicate that the business of fishing did not then, and does not now, disqualify a vessel from also trading in the regular ports of entry.

"I have been led to offer these considerations by the recent seizures of American vessels to which I have adverted and by indications of a local spirit of interpretation in the Provinces, affecting friendly intercourse, which is, I firmly believe, not warranted by the terms of the stipulations on which it professes to rest. It is not my purpose to prejudge the facts of the cases, nor have I any desire to shield any American vessel from the consequences of violation of international obligation. The views I advance may prove not to be applicable in every feature to those particular cases, and I should be glad if no case whatever were to arise calling in question the good understanding of the two countries in this regard in order to be free from the grave apprehensions which otherwise I am unable to dismiss.

"It would be most unfortunate, and, I cannot refrain from saying, most unworthy, if the two nations who contracted the treaty of 1818 should permit any questions of mutual right and duty under that convention to become obscured by partisan advocacy or distorted by the heat of local interests. It cannot but be the common aim to conduct all discussion in this regard with dignity and in a self-respecting spirit, that will show itself intent upon securing equal justice rather than unequal advantage. Comity, courtesy, and justice cannot, I am sure, fail to be the ruling motives and objects of discussion.

"I shall be most happy to come to a distinct and friendly understanding with you, as the representative of Her Britannic Majesty's Government, which will result in such a definition of the rights of American fishing-vessels under the treaty of 1818 as shall effectually prevent any encroachment by them upon the territorial waters of the British provinces for the purpose of fishing within those waters, or trespassing in any way upon the littoral or marine rights of the inhabitants, and, at the same time, prevent that convention from being improperly expanded into an instrument of discord by affecting interests and accomplishing results wholly outside of and contrary to its object and intent, by allowing it to become an agency to interfere with and perhaps destroy those reciprocal commercial privileges and facilities between neighboring communities which contribute so importantly to their peace and happiness. It is obviously essential that the administration of the laws regulating the Canadian inshore fishing should not be conducted in a punitive and hostile spirit, which can only tend to induce acts of a retaliatory nature.

"Everything will be done by the United States to cause their citizens engaged in fishing to conform to the obligations of the treaty,

and prevent an infraction of the fishing laws of the British provinces; but it is equally necessary that ordinary commercial intercourse should not be interrupted by harsh measures and unfriendly administration.

"I have the honor, therefore, to invite a frank expression of your views upon the subject, believing that, should any differences of opinion or disagreement as to facts exist, they will be found to be so minimized that an accord can be established for the full protection of the inshore fishing of the British provinces, without obstructing the open-sea fishing operations of the citizens of the United States or disturbing the trade regulations now subsisting between the countries."

Mr. Bayard, Sec. of State, to Sir L. West, British min., May 10. 1886, For. Rel. 1886, 373.

"Although without reply to the note I had the honor to address to you on the 10th instant, in relation to the Canadian fisheries and the interpretation of the treaty of 1818 between the United States and Great Britain as to the rights and duties of the American citizens engaged in maritime trade and intercourse with the provinces of British North America, in view of the unrestrained, and, as it appears to me, unwarranted, irregular, and severe action of Canadian officials toward American vessels in those waters, yet I feel it to be my duty to bring impressively to your attention information more recently received by me from the United States consul-general at Halifax, Nova Scotia, in relation to the seizure and continued detention of the American schooner *David J. Adams*, already referred to in my previous note, and the apparent disposition of the local officials to use the most extreme and technical reasons for interference with vessels not engaged in or intended for inshore fishing on that coast.

"The report received by me yesterday evening alleges such action in relation to the vessel mentioned as renders it difficult to imagine it to be that orderly proceeding and 'due process of law' so well known and customarily exercised in Great Britain and the United States, and which dignifies the two Governments, and gives to private rights of property and the liberty of the individual their essential safeguards.

"By the information thus derived it would appear that after four several and distinct visitations by boats' crews from the *Lansdowne*, in Annapolis Basin, Nova Scotia, the *David J. Adams* was summarily taken into custody by the Canadian steamer *Lansdowne* and carried out of the province of Nova Scotia, across the Bay of Fundy, and into the port of St. John, New Brunswick, and, without explanation or hearing, on the following Monday, May 10, taken back again by an

Mr. Bayard's note  
of May 20, 1886.

armed crew to Digby in Nova Scotia. That in Digby the paper alleged to be the legal precept for the capture and detention of the vessel was nailed to her mast in such manner as to prevent its contents being read, and the request of the captain of the *David J. Adams* and of the United States consul-general to be allowed to detach the writ from the mast for the purpose of learning its contents was positively refused by the provincial official in charge. Nor was the United States consul-general able to learn from the commander of the *Lansdowne* the nature of the complaint against the vessel, and his respectful application to that effect was fruitless.

"In so extraordinary, confused, and irresponsible a condition of affairs, it is not possible to ascertain with that accuracy which is needful in matters of such grave importance the precise grounds for this harsh and peremptory arrest and detention of a vessel the property of citizens of a nation with whom relations of peace and amity were supposed to exist.

"From the best information, however, which the United States-consul-general was enabled to obtain after application to the prosecuting officials, he reports that the *David J. Adams* was seized and is now held (1) for alleged violation of the treaty of 1818; (2) for alleged violation of the act 59 Geo. III.; (3) for alleged violation of the colonial act of Nova Scotia of 1868; and (4) for alleged violation of the act of 1870 and also that of 1883, both Canadian statutes.

"Of these allegations there is but one which at present I press upon your immediate consideration, and that is the alleged infraction of the treaty of 1818.

"I beg to recall to your attention the correspondence and action of those respectively charged with the administration and government of Great Britain and the United States in the year 1870, when the same international questions were under consideration and the status of law was not essentially different from what it is at present.

"This correspondence discloses the intention of the Canadian authorities of that day to prevent encroachment upon their inshore fishing grounds, and their preparations in the way of a marine police force, very much as we now witness. The statutes of Great Britain and of her Canadian provinces, which are now supposed to be invoked as authority for the action against the schooner *David J. Adams*, were then reported as the basis of their proceedings.

"In his note of May 26, 1870, Mr. (afterwards Sir Edward) Thornton, the British minister at this capital, conveyed to Mr. Fish, then Secretary of State, copies of the orders of the royal Admiralty to Vice-Admiral Wellesley, in command of the naval forces employed in maintaining order at the fisheries in the neighborhood of the coasts of Canada.'



“All of these orders directed the protection of Canadian fishermen and cordial cooperation and concert with the United States force sent on the same service with respect to American fishermen in those waters. Great caution in the arrest of American vessels charged with violation of the Canadian fishing laws was scrupulously enjoined upon the British authorities, and the extreme importance of the commanding officers of ships selected to protect the fisheries exercising the utmost discretion in paying especial attention to Lord Granville's observation, that no vessel should be seized unless it were evident, and could be clearly proved, that the offense of fishing had been committed, and the vessel captured within three miles of land.

“This caution was still more explicitly announced when Mr. Thornton, on the 11th of June, 1870, wrote to Mr. Fish:

“‘You are, however, quite right in not doubting that Admiral Wellesley, on the receipt of the later instructions addressed to him on the 5th ultimo, will have modified the directions to the officers under his command so that they may be in conformity with the views of the Admiralty. In confirmation of this I have since received a letter from Vice-Admiral Wellesley dated the 30th ultimo, informing me that he had received instructions to the effect that officers of Her Majesty's ships employed in the protection of the fisheries should not seize any vessel unless it were evident, and could be clearly proved, that the offense of fishing had been committed and the vessel itself captured within three miles of land.’

“This understanding between the two Governments wisely and efficiently guarded against the manifest danger of intrusting the execution of powers so important and involving so high and delicate a discretion to any but wise and responsible officials, whose prudence and care should be commensurate with the magnitude and national importance of the interests involved. And I should fail in my duty if I did not endeavor to impress you with my sense of the absolute and instant necessity that now exists for a restriction of the seizure of American vessels charged with violations of the treaty of 1818 to the conditions announced by Sir Edward Thornton to this Government in June, 1870.

“The charges of violating the local laws and commercial regulations of the ports of the British Provinces (to which I am desirous that due and full observance should be paid by citizens of the United States), I do not consider in this note, and I will only take this occasion to ask you to give me full information of the official action of the Canadian authorities in this regard, and what laws and regulations having the force of law, in relation to the protection of their inshore fisheries and preventing encroachments thereon, are now held by them to be in force.

"But I trust you will join with me in realizing the urgent and essential importance of restricting all arrests of American fishing vessels for supposed or alleged violations of the convention of 1818 within the limitations and conditions laid down by the authorities of Great Britain in 1870, to wit: That no vessel shall be seized unless it is evident and can be clearly proved that the offense of fishing has been committed and the vessel itself captured within three miles of land.

"In regard to the necessity for the instant imposition of such restrictions upon the arrest of vessels, you will, I believe, agree with me, and I will therefore ask you to procure such steps to be taken as shall cause such orders to be forthwith put in force under the authority of Her Majesty's Government."

Mr. Bayard, Sec. of State, to Sir L. West, British min., May 20, 1886, For. Rel. 1886, 377.

"Since the conversation I had the honor to hold with your lordship, on the morning of the 29th ultimo., I have received from my Government a copy of the report of the consul-general of the United States at Halifax, giving full details and depositions relative to the seizure of the *David J. Adams*, and the correspondence between the consul-general and the colonial authorities in reference thereto.

"The report of the consul-general and the evidence annexed to it appear fully to sustain the point submitted to your lordship in the interview above referred to, touching the seizure of this vessel by the Canadian officials.

"I do not understand it to be claimed by the Canadian authorities that the vessel seized had been engaged or was intending to engage in fishing within any limit prohibited by the treaty of 1818.

"The occupation of the vessel was exclusively deep-sea fishing, a business in which it had a perfect right to be employed. The ground upon which the capture was made was that the master of the vessel had purchased of an inhabitant of Nova Scotia, near the port of Digby, in that province, a day or two before, a small quantity of bait to be used in fishing in the deep sea, outside the three-mile limit.

"The question presented is whether, under the terms of the treaty and the construction placed upon them in practice for many years by the British Government, and in view of the existing relations between the United States and Great Britain, that transaction affords a sufficient reason for making such a seizure and for proceeding under it to the confiscation of the vessel and its contents.

"I am not unaware that the Canadian authorities, conscious, apparently, that the affirmative of this proposition could not be maintained, deemed it advisable to supplement it with a charge against the vessel

of a violation of the Canadian customs act of 1883, in not reporting her arrival at Digby to the customs officer. But this charge is not the one on which the vessel was seized, or which must now be principally relied on for its condemnation, and standing alone could hardly, even if well founded, be the source of any serious controversy. It would be at most, under the circumstances, only an accidental and purely technical breach of a custom-house regulation, by which no harm was intended, and from which no harm came, and would in ordinary cases be easily condoned by an apology, and perhaps the payment of costs.

“ But trivial as it is, this charge does not appear to be well founded in point of fact. Digby is a small fishing settlement and its harbor not defined. The vessel had moved about and anchored in the outer part of the harbor, having no business at, or communication with Digby, and no reason for reporting to the officer of customs. It appears by the report of the consul-general to be conceded by the customs authorities there that fishing vessels have for forty years been accustomed to go in and out of the bay at pleasure, and have never been required to send ashore and report when they had no business with the port, and made no landing; and that no seizure had ever before been made or claimed against them for so doing.

“ Can it be reasonably insisted under these circumstances that by the sudden adoption, without notice, of a new rule, a vessel of a friendly nation should be seized and forfeited for doing what all similar vessels had for so long a period been allowed to do without question?

“ It is sufficiently evident that the claim of a violation of the customs act was an afterthought, brought forward to give whatever added strength it might to the principal claim on which the seizure had been made.

“ Recurring, then, to the only real question in the case, whether the vessel is to be forfeited for purchasing bait of an inhabitant of Nova Scotia, to be used in lawful fishing, it may be readily admitted that if the language of the treaty of 1818 is to be interpreted literally, rather than according to its spirit and plain intent, a vessel engaged in fishing would be prohibited from entering a Canadian port ‘ for any purpose whatever ’ except to obtain wood or water, to repair damages, or to seek shelter. Whether it would be liable to the extreme penalty of confiscation for a breach of this prohibition in a trifling and harmless instance might be quite another question.

“ Such a literal construction is best refuted by considering its preposterous consequences. If a vessel enters a port to post a letter, or send a telegram, or buy a newspaper, to obtain a physician in case of illness, or a surgeon in case of accident, to land or bring off a passenger, or even to lend assistance to the inhabitants in fire, flood,

or pestilence, it would, upon this construction, be held to violate the treaty stipulations maintained between two enlightened maritime and most friendly nations, whose ports are freely open to each other in all other places and under all other circumstances. If a vessel is not engaged in fishing she may enter all ports; but if employed in fishing, not denied to be lawful, she is excluded, though on the most innocent errand. She may buy water, but not food or medicine: wood, but not coal. She may repair rigging, but not purchase a new rope, though the inhabitants are desirous to sell it. If she even entered the port (having no other business) to report herself to the custom-house, as the vessel in question is now seized for not doing, she would be equally within the interdiction of the treaty. If it be said these are extreme instances of violation of the treaty not likely to be insisted on, I reply that no one of them is more extreme than the one relied upon in this case.

"I am persuaded that your lordship will, upon reflection, concur with me that an intention so narrow, and in its result so unreasonable and so unfair, is not to be attributed to the high contracting parties who entered into this treaty.

"It seems to me clear that the treaty must be construed in accordance with those ordinary and well-settled rules applicable to all written instruments, which without such salutary assistance must constantly fail of their purpose. By these rules the letter often gives way to the intent, or rather is only used to ascertain the intent.

"The whole document will be taken together, and will be considered in connection with the attendant circumstances, the situation of the parties, and the object in view, and thus the literal meaning of an isolated clause is often shown not to be the meaning really understood or intended.

"Upon these principles of construction the meaning of the clause in question does not seem doubtful. It is a treaty of friendship and not of hostility. Its object was to define and protect the relative rights of the people of the two countries in these fisheries, not to establish a system of nonintercourse or the means of mutual and unnecessary annoyance. It should be judged in view of the general rules of international comity and of maritime intercourse and usage, and its restrictions considered in the light of the purposes they were designed to serve.

"Thus regarded it appears to me clear that the words 'for no other purpose whatever,' as employed in the treaty, mean no other purposes inconsistent with the provisions of the treaty, or prejudicial to the interests of the provinces or their inhabitants, and were not intended to prevent the entry of American fishing vessels into Canadian ports for innocent and mutually beneficial purposes, or unnecessarily to restrict the free and friendly intercourse customary between all civi-

lized maritime nations, and especially between the United States and Great Britain. Such, I can not but believe, is the construction that would be placed upon this treaty by any enlightened court of justice.

“ But even were it conceded that if the treaty was a private contract, instead of an international one, a court in dealing with an action upon it might find itself hampered by the letter from giving effect to the intent, that would not be decisive of the present case.

“ The interpretation of treaties between nations in their intercourse with each other proceeds upon broader and higher considerations. The question is not what is the technical effect of words, but what is the construction most consonant to the dignity, the just interests, and the friendly relations of the sovereign powers. I submit to your lordship that a construction so harsh, so unfriendly, so unnecessary, and so irritating as that set up by the Canadian authorities is not such as Her Majesty's Government has been accustomed either to accord or to submit to. It would find no precedent in the history of British diplomacy, and no provocation in any action or assertion of the Government of the United States.

“ These views derive great, if not conclusive, force from the action of the British Parliament on the subject, adopted very soon after the treaty of 1818 took effect, and continued without change to the present time.

“ An act of Parliament (59 George III. chap. 38) was passed June 14, 1819, to provide for carrying into effect the provisions of the treaty. After reciting the terms of the treaty, it enacts (in substance) that it shall be lawful for His Majesty by orders in council to make such regulations and to give such directions, orders, and instructions to the governor of Newfoundland or to any officer or officers in that station, or to any other persons ‘ as shall or may be from time to time deemed proper and necessary for the carrying into effect the purposes of said convention *with relation to the taking, drying, and curing of fish by inhabitants of the United States of America*, in common with British subjects within the limits set forth in the aforesaid convention.’

“ It further enacts that any foreign vessel engaged in fishing, or preparing to fish, within three marine miles of the coast (not authorized to do so by treaty) shall be seized or forfeited upon prosecution in the proper court.

“ It further provides as follows:

“ ‘ That it shall and may be lawful for any fisherman of the said United States to enter into any such bays or harbors of his Britannic Majesty's dominions in America as are last mentioned for the purpose of shelter and repairing damages therein and of purchasing wood and of obtaining water, and for no other purpose whatever, subject nevertheless to such restrictions as may be necessary to prevent such fishermen of the said United States from taking, drying, or curing fish in

the said bays or harbors, or in any other manner whatever abusing the said privileges by the said treaty and this act reserved to them, and as shall for that purpose be imposed by an order or orders to be from time to time made by His Majesty in council under the authority of this act, and by any regulations which shall be issued by the governor or person exercising the office of governor in any such parts of His Majesty's dominions in America, under or in pursuance of any such an order in council as aforesaid.'

"It further provides as follows:

"That if any person or persons upon requisition made by the governor of Newfoundland, or the person exercising the office of governor, or by any governor or person exercising the office of governor, in any other parts of His Majesty's dominions in America as aforesaid, or by any officer or officers acting under such governor, or person exercising the office of governor, in the execution of any orders or instructions from His Majesty in council, shall refuse to depart from such bays or harbors; or if any person or persons shall refuse or neglect to conform to any regulations or directions which shall be made or given for the execution of any of the purposes of this act: every such person so refusing or otherwise offending against this act shall forfeit the sum of £200, to be recovered, &c.'

"It will be perceived from these extracts, and still more clearly from a perusal of the entire act, that while reciting the language of the treaty in respect to the purposes for which American fishermen may enter British ports, it provides no forfeiture or penalty for any such entry unless accompanied either (1) by fishing or preparing to fish within the prohibited limits, or (2) by the infringement of restrictions that may be imposed by orders in council to prevent such fishing or the drying or curing of fish, or the abuse of privileges reserved by the treaty, or (3) by a refusal to depart from the bays or harbors upon proper requisition.

"It thus plainly appears that it was not the intention of Parliament, nor its understanding of the treaty, that any other entry by an American fishing vessel into a British port should be regarded as an infraction of its provisions, or as affording the basis of proceedings against it.

"No other act of Parliament for the carrying out of this treaty has ever been passed. It is unnecessary to point out that it is not in the power of the Canadian Parliament to enlarge or alter the provisions of the act of the Imperial Parliament, or to give to the treaty either a construction or a legal effect not warranted by that act.

"But until the effort which I am informed is now in progress in the Canadian Parliament for the passage of a new act on the subject, introduced since the seizures under consideration, I do not understand that any statute has ever been enacted in that Parliament which at-

tempts to give any different construction or effect to the treaty from that given by the act of 59 George III.

“The only provincial statutes which, in the proceedings against the *David J. Adams*, that vessel has thus far been charged with infringing are the colonial acts of 1868, 1870, and 1883. It is therefore fair to presume that there are no other colonial acts applicable to the case, and I know of none.

“The act of 1868, among other provisions not material to this discussion, provides for a forfeiture of foreign vessels ‘found fishing, or preparing to fish, or to have been fishing, in British waters within three marine miles of the coast,’ and also provides a penalty of \$400 against a master of a foreign vessel within the harbor who shall fail to answer questions put in an examination by the authorities. No other act is by this statute declared to be illegal; and no other penalty or forfeiture is provided for.

“The very extraordinary provisions in this statute for facilitating forfeitures and embarrassing defense, or appeal from them, not material to the present case, would, on a proper occasion, deserve very serious attention.

“The act of 1883 has no application to the case, except upon the point of the omission of the vessel to report to the customs officer already considered.

“It results, therefore, that at the time of the seizure of the *David J. Adams* and other vessels there was no act whatever, either of the British or colonial parliaments, which made the purchase of bait by those vessels illegal, or provided for any forfeiture, penalty, or proceedings against them for such a transaction, and even if such purchase could be regarded as a violation of that clause of the treaty which is relied on, no law existed under which the seizure could be justified. It will not be contended that custom-house authorities or colonial courts can seize and condemn vessels for a breach of the stipulations of a treaty when no legislation exists which authorizes them to take cognizance of the subject, or invests them with any jurisdiction in the premises. Of this obvious conclusion the Canadian authorities seem to be quite aware. I am informed that since the seizures they have pressed or are pressing through the Canadian Parliament in much haste an act which is designed for the first time in the history of the legislation under this treaty to make the facts upon which the American vessels have been seized illegal, and to authorize proceedings against them therefor.

“What the effect of such an act will be in enlarging the provisions of an existing treaty between the United States and Great Britain need not be considered here. The question under discussion depends upon the treaty and upon such legislation warranted by the treaty as existed when the seizures took place.

“The practical construction given to the treaty down to the present time has been in entire accord with the conclusions thus deduced from the act of Parliament. The British Government has repeatedly refused to allow interference with American fishing vessels, unless for illegal fishing, and has given explicit orders to the contrary.

“On the 26th of May, 1870, Mr. Thornton, the British minister at Washington, communicated officially to the Secretary of State of the United States copies of the orders addressed by the British admiralty to Admiral Wellesley, commanding Her Majesty's naval forces on the North American station, and of a letter from the colonial department to the foreign office, in order that the Secretary might ‘see the nature of the instructions to be given to Her Majesty's and the Canadian officers employed in maintaining order at the fisheries in the neighborhood of the coasts of Canada.’ Among the documents thus transmitted is a letter from the foreign office to the secretary of the admiralty, in which the following language is contained:

“‘The Canadian government has recently determined, with the concurrence of Her Majesty's ministers, to increase the stringency of the existing practice of dispensing with the warnings hitherto given, and seizing at once any vessel detected in violating the law.

“‘In view of this change and of the questions to which it may give rise, I am directed by Lord Granville to request that you will move their lordships to instruct the officers of Her Majesty's ships employed in the protection of the fisheries that they are not to seize any vessel unless it is evident and can be clearly proved that the offense of fishing has been committed and the vessel itself captured within three miles of land.’

“In the letter from the lords of the admiralty to Vice-Admiral Wellesley of May 5, 1870, in accordance with the foregoing request, and transmitting the letter above quoted from, there occurs the following language:

“‘My lords desire me to remind you of the extreme importance of commanding officers of the ships selected to protect the fisheries exercising the utmost discretion in carrying out their instructions, paying special attention to Lord Granville's observation that no vessel should be seized unless it is evident and can be clearly proved that the offense of fishing has been committed, and that the vessel is captured within three miles of land.’

“Lord Granville, in transmitting to Sir John Young the aforesaid instructions, makes use of the following language:

“‘Her Majesty's Government do not doubt that your ministers will agree with them as to the propriety of these instructions, and will give corresponding instructions to the vessels employed by them.’

“These instructions were again officially stated by the British



minister at Washington to the Secretary of State of the United States in a letter dated June 11, 1870.

“Again, in February, 1871, Lord Kimberly, colonial secretary, wrote to the Governor-General of Canada as follows:

“‘The exclusion of American fishermen from resorting to Canadian ports, except for the purpose of shelter, and of repairing damages therein, purchasing wood, and of obtaining water, might be warranted by the letter of the treaty of 1818, and by the terms of the imperial act 59 George III, chap. 38, but Her Majesty’s Government feel bound to state that it seems to them an extreme measure, inconsistent with the general policy of the Empire, and they are disposed to concede this point to the United States Government under such restrictions as may be necessary to prevent smuggling, and to guard against any substantial invasion of the exclusive rights of fishing which may be reserved to British subjects.’

“And in a subsequent letter from the same source to the Governor-General, the following language is used:

“‘I think it right, however, to add that the responsibility of determining what is the true construction of a treaty made by Her Majesty with any foreign power must remain with Her Majesty’s Government, and that the degree to which this country would make itself a party to the strict enforcement of the treaty rights may depend not only on the literal construction of the treaty, but on the moderation and reasonableness with which these rights are asserted.’

“I am not aware that any modification of these instructions or any different rule from that therein contained has ever been adopted or sanctioned by Her Majesty’s Government.

“Judicial authority upon this question is to the same effect. That the purchase of bait by American fishermen in the provincial ports has been a common practice is well known. But in no case, so far as I can ascertain, has a seizure of an American vessel ever been enforced on the ground of the purchase of bait, or of any other supplies. On the hearing before the Halifax Fisheries Commission in 1877 this question was discussed, and no case could be produced of any such condemnation. Vessels shown to have been condemned were in all cases adjudged guilty, either of fishing, or preparing to fish, within the prohibited limit. And in the case of the *White Fawn*, tried in the admiralty court of New Brunswick before Judge Hazen in 1870, I understand it to have been distinctly held that the purchase of bait, unless proved to have been in preparation for illegal fishing, was not a violation of the treaty, nor of any existing law, and afforded no ground for proceedings against the vessel.

“But even were it possible to justify on the part of the Canadian authorities the adoption of a construction of the treaty entirely different from that which has always heretofore prevailed, and to de-

clare those acts criminal which have hitherto been regarded as innocent, upon obvious grounds of reason and justice, and upon common principles of comity to the United States Government, previous notice should have been given to it or to the American fishermen of the new and stringent instructions it was intended to enforce.

"If it was the intention of Her Majesty's Government to recall the instructions which I have shown had been previously and so explicitly given relative to the interference with American vessels, surely notice should have been given accordingly.

"The United States have just reason to complain, even if these restrictions could be justified by the treaty or by the acts of Parliament passed to carry it into effect, that they should be enforced in so harsh and unfriendly a manner without notice to the Government of the change of policy, or to the fishermen of the new danger to which they were thus exposed.

"In any view, therefore, which it seems to me can be taken of this question, I feel justified in pronouncing the action of the Canadian authorities in seizing and still retaining the *David J. Adams*, to be not only unfriendly and discourteous, but altogether unwarrantable.

"The seizure was much aggravated by the manner in which it was carried into effect. It appears that four several visitations and searches of the vessel were made by boats from the Canadian steamer *Lansdowne*, in Annapolis Basin, Nova Scotia. The *Adams* was finally taken into custody and carried out of the province of Nova Scotia, across the Bay of Fundy, and into the port of St. John, New Brunswick, and without explanation or hearing, on the following Monday, May 10, taken back by an armed crew to Digby, Nova Scotia. That, in Digby, the paper alleged to be the legal precept for the capture and detention of the vessel was nailed to her mast in such manner as to prevent its contents being read, and the request of the captain of the *David J. Adams* and of the United States consul-general to be allowed to detach the writ from the mast for the purpose of learning its contents was positively refused by the provincial official in charge. Nor was the United States consul-general able to learn from the commander of the *Lansdowne* the nature of the complaint against the vessel, and his respectful application to that effect was fruitless.

"From all the circumstances attending this case, and other recent cases like it, it seems to me very apparent that the seizure was not made for the purpose of enforcing any right or redressing any wrong. As I have before remarked, it is not pretended that the vessel had been engaged in fishing, or was intending to fish in the prohibited waters, or that it had done or was intending to do any other injurious act. It was proceeding upon its regular and lawful business of fishing in the deep sea. It had received no request, and of course

could have disregarded no request, to depart, and was, in fact, departing when seized; nor had its master refused to answer any questions put by the authorities. It had violated no existing law, and had incurred no penalty that any known statute imposed.

“It seems to me impossible to escape the conclusion that this and other similar seizures were made by the Canadian authorities for the deliberate purpose of harassing and embarrassing the American fishing vessels in the pursuit of their lawful employment. And the injury, which would have been a serious one, if committed under a mistake, is very much aggravated by the motives which appear to have prompted it.

“I am instructed by my Government earnestly to protest against these proceedings as wholly unwarranted by the treaty of 1818, and altogether inconsistent with the friendly relations hitherto existing between the United States and Her Majesty's Government; to request that the *David J. Adams*, and the other American fishing vessels now under seizure in Canadian ports, be immediately released, and that proper orders may be issued to prevent similar proceedings in the future. And I am also instructed to inform you that the United States will hold Her Majesty's Government responsible for all losses which may be sustained by American citizens in the dispossession of their property growing out of the search, seizure, detention, or sale of their vessels lawfully within the territorial waters of British North America.

“The real source of the difficulty that has arisen is well understood. It is to be found in the irritation that has taken place among a portion of the Canadian people on account of the termination by the United States Government of the treaty of Washington on the 1st of July last, whereby fish imported from Canada into the United States, and which so long as that treaty remained in force was admitted free, is now liable to the import duty provided by the general revenue laws, and the opinion appears to have gained ground in Canada that the United States may be driven, by harassing and annoying their fishermen, into the adoption of a new treaty by which Canadian fish shall be admitted free.

“It is not necessary to say that this scheme is likely to prove as mistaken in policy as it is indefensible in principle. In terminating the treaty of Washington the United States were simply exercising a right expressly reserved to both parties by the treaty itself, and of the exercise of which by either party neither can complain. They will not be coerced by wanton injury into the making of a new one. Nor would a negotiation that had its origin in mutual irritation be promising of success. The question now is, not what fresh treaty may or might be desirable, but what is the true and just

construction, as between the two nations, of the treaty that already exists.

"The Government of the United States, approaching this question in the most friendly spirit, cannot doubt that it will be met by Her Majesty's Government in the same spirit, and feels every confidence that the action of Her Majesty's Government in the premises will be such as to maintain the cordial relations between the two countries that have so long happily prevailed."

Mr. Phelps, min. to England, to Lord Roseberry, foreign secretary, June 2, 1886, For. Rel. 1886, 311.

Referring to this note, and the materials of which it was composed, Mr. Bayard said: "The views and arguments you adduce are fully in accord with the instructions already sent you, and are so ably advanced and enforced that I have for the present, and pending Lord Roseberry's reply, nothing further to suggest on these points." (Mr. Bayard, Sec. of State, to Mr. Phelps, min. to England, No. 328, June 18, 1886, For. Rel. 1886, 346.)

"The undersigned having had his attention called by your excellency to a communication from Mr. Bayard, Secretary of State of the United States, dated the 10th May, and addressed to Her Majesty's minister at Washington, and to a further communication from Mr. Bayard, dated the 20th May instant, in reference to the seizure of the American fishing vessel *David J. Adams*, begs leave to submit the following observations thereon:

"Your excellency's Government fully appreciates and reciprocates Mr. Bayard's desire that the administration of the laws regulating the commercial interests and the mercantile marine of the two countries might be such as to promote good feeling and mutual advantage.

"Canada has given many indisputable proofs of an earnest desire to cultivate and extend her commercial relations with the United States, and it may not be without advantage to recapitulate some of those proofs.

"For many years before 1854 the maritime provinces of British North America had complained to Her Majesty's Government of the continuous invasion of their inshore fisheries (sometimes accompanied, it was alleged, with violence) by American fishermen and fishing vessels.

"Much irritation naturally ensued, and it was felt to be expedient by both Governments to put an end to this unseemly state of things by treaty, and at the same time to arrange for enlarged trade relations between the United States and the British North American colonies. The reciprocity treaty of 1854 was the result, by which were not only our inshore fisheries opened to the Americans, but provision was made for the free interchange of the principal natural products of

both countries, including those of the sea. Peace was preserved on our waters, and the volume of international trade steadily increased during the existence of this treaty, and until it was terminated in 1866, not by Great Britain, but by the United States.

"In the following year Canada (then become a dominion and united to Nova Scotia and New Brunswick) was thrown back on the convention of 1818, and obliged to fit out a marine police to enforce the laws and defend her rights, still desiring, however, to cultivate friendly relations with her great neighbor, and not too suddenly to deprive the American fishermen of their accustomed fishing grounds and means of livelihood. She readily acquiesced in the proposal of Her Majesty's Government for the temporary issue of annual licenses to fish on payment of a moderate fee. Your excellency is aware of the failure of that scheme. A few licenses were issued at first, but the applications for them soon ceased, and the American fishermen persisted in forcing themselves into our waters 'without leave or license.'

"Then came the recurrence, in an aggravated form, of all the troubles which had occurred anterior to the reciprocity treaty. There were invasions of our waters, personal conflicts between our fishermen and American crews, the destruction of nets, the seizure and condemnation of vessels, and intense consequent irritation on both sides.

"This was happily put an end to by the Washington treaty of 1871. In the interval between the termination of the first treaty and the ratification of that by which it was eventually replaced, Canada on several occasions pressed, without success, through the British minister at Washington, for a renewal of the reciprocity treaty or for the negotiation of another on a still wider basis.

"When in 1874 Sir Edward Thornton, then British minister at Washington, and the late Hon. George Brown, of Toronto, were appointed joint plenipotentiaries for the purpose of negotiating and concluding a treaty relating to fisheries, commerce, and navigation, a provisional treaty was arranged by them with the United States Government, but the Senate decided that it was not expedient to ratify it, and the negotiation fell to the ground.

"The treaty of Washington, while it failed to restore the provisions of the treaty of 1854, for reciprocal free trade (except in fish), at least kept the peace, and there was tranquillity along our shores until July, 1885, when it was terminated again by the United States Government and not by Great Britain.

"With a desire to show that she wished to be a good neighbor, and in order to prevent loss and disappointment on the part of the United States fishermen by their sudden exclusion from her waters in the middle of the fishing season, Canada continued to allow them, for six months, all the advantages which the rescinded fishery clauses

had previously given them, although her people received from the United States none of the corresponding advantages which the treaty of 1871 had declared to be an equivalent for the benefits secured thereby to the American fishermen.

"The President, in return for this courtesy, promised to recommend to Congress the appointment of a joint commission of the two Governments of the United Kingdom and the United States to consider the fishery question, with permission also to consider the whole state of trade relations between the United States and Canada.

"This promise was fulfilled by the President, but the Senate rejected his recommendation and refused to sanction the commission.

"Under these circumstances Canada, having exhausted every effort to procure an amicable arrangement, has been driven again to fall back upon the convention of 1818, the provisions of which she is now enforcing and will enforce, in no punitive or hostile spirit as Mr. Bayard supposes, but solely in protection of her fisheries, and in vindication of the right secured to her by treaty.

"Mr. Bayard suggests that 'the treaty of 1818 was between two nations—the United States of America and Great Britain—who, as the contracting parties, can alone apply authoritative interpretation thereto, and enforce its provisions by appropriate legislation.'

"As it may be inferred from this statement that the right of the Parliament of Canada to make enactments for the protection of the fisheries of the Dominion, and the power of the Canadian officers to protect those fisheries, are questioned, it may be well to state at the outset the grounds upon which it is conceived by the undersigned that the jurisdiction in question is clear beyond a doubt.

"1. In the first place the undersigned would ask it to be remembered that the extent of the jurisdiction of the Parliament of Canada is not limited (nor was that of the provinces before the union) to the seacoast, but extends for three marine miles from the shore as to all matters over which any legislative authority can in any country be exercised within that space. The legislation which has been adopted on this subject by the Parliament of Canada (and previously to confederation by the provinces) does not reach beyond that limit. It may be assumed that, in the absence of any treaty stipulation to the contrary, this right is so well recognized and established by both British and American law that the grounds on which it is supported need not be stated here at large. The undersigned will merely add, therefore, to this statement of the position, that so far from the right being limited by the convention of 1818 that convention expressly recognizes it.

"After renouncing the liberty to 'take, cure, or dry fish on or within three marine miles of any of the coasts, bays, creeks, or harbors of His Majesty's dominions in America,' there is a stipulation

that while American fishing vessels shall be admitted to enter such bays, &c., 'for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, they shall be under such restrictions as may be necessary to prevent their taking, curing, or drying fish therein, or in any other manner whatever abusing the privileges reserved to them.'

"2. Appropriate legislation on this subject was, in the first instance, adopted by the Parliament of the United Kingdom. The imperial statute 59 Geo. III., cap. 38, was enacted in the year following the convention, in order to give that convention force and effect. That statute declared that, except for the purposes before specified, it should 'not be lawful for any person or persons, not being a natural-born subject of His Majesty, in any foreign ship, vessel, or boat, nor for any person in any ship, vessel, or boat, other than such as shall be navigated according to the laws of the United Kingdom of Great Britain and Ireland, to fish for, or to take, dry, or cure any fish of any kind whatever within three marine miles of any coasts, bays, creeks, or harbors whatever, in any part of His Majesty's dominions in America, not included within the limits specified and described in the first article of the said convention, and that if such foreign ship, vessel, or boat, or any person or persons on board thereof shall be found fishing, or to have been fishing, or preparing to fish within such distance of such coasts, bays, creeks, or harbors within such parts of His Majesty's dominions in America, out of the said limits as aforesaid, all such ships, vessels, and boats, together with their cargoes, and all guns, ammunition, tackle, apparel, furniture, and stores, shall be forfeited, and shall and may be seized, taken, sued for, prosecuted, recovered, and condemned by such and the like ways, means, and methods, and in the same courts as ships, vessels, or boats may be forfeited, seized, prosecuted, and condemned for any offense against any laws relating to the revenue of customs, or the laws of trade and navigation, under any act or acts of the Parliament of Great Britain or the United Kingdom of Great Britain and Ireland, provided that nothing contained in this act shall apply or be construed to apply to the ships or subjects of any prince, power, or state in amity with His Majesty who are entitled by treaty with His Majesty to any privileges of taking, drying, or curing fish on the coasts, bays, creeks, or harbors or within the limits in this act described. Provided always, that it shall and may be lawful for any fishermen of the said United States to enter into any such bays or harbors of His Britannic Majesty's dominions in America as are last mentioned, for the purpose of shelter and repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever, subject nevertheless to such restrictions as may be necessary to prevent such fishermen of the said United States from taking, drying, or curing

fish in the said bays or harbors, or in any other manner whatever, abusing the said privileges by the said treaty and this act reserved to them, and as shall, for that purpose, be imposed by any order or orders to be from time to time made by His Majesty in council under the authority of this act, and by any regulations which shall be issued by the governor or person exercising the office of governor in any such parts of His Majesty's dominions in America, under or in pursuance of any such order in council as aforesaid. And that if any person or persons upon requisition made by the governor of Newfoundland, or the person exercising the office of governor, or by any governor in person exercising the office of governor in any other parts of His Majesty's dominions in America, aforesaid, or by any officer or officers acting under such governor or person exercising the office of governor, in the execution of any orders or instructions from His Majesty in council, shall refuse to depart from such bays or harbors, or if any person or persons shall refuse, or neglect, to conform to any regulations or directions which shall be made or given for the execution of any of the purposes of this act, every such person so refusing or otherwise offending against this act shall forfeit the sum of two hundred pounds, to be recovered in the superior court of judicature of the island of Newfoundland, or in the superior court of judicature of the colony or settlement within or near to which such offense shall be committed, or by bill, plaint, or information in any of His Majesty's courts of record at Westminster, one moiety of such penalty to belong to His Majesty, his heirs, and successors, and the other moiety to such person or persons as shall sue or prosecute for the same.'

"The acts passed by the provinces now forming Canada, and also by the Parliament of Canada (now noted in the margin)<sup>a</sup> are to the same effect, and may be said to be merely declaratory of the law as established by the imperial statute.

"3. The authority of the legislatures of the provinces, and, after confederation, the authority of the Parliament of Canada, to make enactments to enforce the provisions of the convention, as well as the authority of Canadian officers to enforce those acts, rests on well-known constitutional principles.

"Those legislatures existed, and the Parliament of Canada now exists, by the authority of the Parliament of the United Kingdom of Great Britain and Ireland, which is one of the nations referred to by Mr. Bayard as the 'contracting parties.' The colonial statutes have received the sanction of the British sovereign, who, and not the

<sup>a</sup> Dominion acts, 31 Vict., cap. 6; 33 Vict., cap. 16; now incorporated in Revised Statutes of 1886, cap. 90. Nova Scotia acts, Revised Statutes, 3d series, cap. 94, 29 Vict. (1866), cap. 35. New Brunswick acts, 16 Vict. (1853), cap. 69. Prince Edward Island acts, 6 Vict. (1843), cap. 14.



nation, is actually the party with whom the United States made the convention. The officers who are engaged in enforcing the acts of Canada or the laws of the Empire, are Her Majesty's officers, whether their authority emanates directly from the Queen, or from her representative, the governor-general. The jurisdiction thus exercised cannot, therefore, be properly described in the language used by Mr. Bayard as a supposed and therefore questionable delegation of jurisdiction by the Imperial Government of Great Britain. Her Majesty governs in Canada as well as in Great Britain; the officers of Canada are her officers; the statutes of Canada are her statutes, passed on the advice of her Parliament sitting in Canada.

"It is, therefore, an error to conceive that because the United States and Great Britain were, in the first instance, the contracting parties to the treaty of 1818, no question arising under that treaty can be 'responsibly dealt with,' either by the Parliament or by the authorities of the Dominion.

"The raising of this objection now is the more remarkable, as the Government of the United States has long been aware of the necessity of reference to the colonial legislatures in matters affecting their interests.

"The treaties of 1854 and 1871 expressly provide that, so far as they concerned the fisheries or trade relations with the provinces, they should be subject to ratification by their several legislatures; and seizures of American vessels and goods, followed by condemnation for breach of the provincial customs laws, have been made for forty years without protest or objection on the part of the United States Government.

"The undersigned, with regard to this contention of Mr. Bayard, has further to observe that in the proceedings which have recently been taken for the protection of the fisheries, no attempt has been made to put any special or novel interpretation on the convention of 1818. The seizures of the fishing vessels have been made in order to enforce the explicit provisions of that treaty, the clear and long established provisions of the imperial statute and of the statutes of Canada expressed in almost the same language.

"The proceedings which have been taken to carry out the law of the Empire in the present case are the same as those which have been taken from time to time during the period in which the convention has been in force, and the seizures of vessels have been made under process of the imperial court of vice-admiralty established in the provinces of Canada.

"Mr. Bayard further observes that since the treaty of 1818, 'a series of laws and regulations affecting the trade between the North

American provinces and the United States have been respectively adopted by the two countries, and have led to amicable and mutually beneficial relations between their respective inhabitants,' and that 'the independent and yet concurrent action of the two Governments has effected a gradual extension from time to time of the provisions of article 1 of the convention of the 3d of July, 1815, providing for reciprocal liberty of commerce between the United States and the territories of Great Britain in Europe, so as gradually to include the colonial possessions of Great Britain in North America and the West Indies within the limits of that treaty.'

"The undersigned has not been able to discover, in the instances given by Mr. Bayard, any evidence that the laws and regulations affecting the trade between the British North American Provinces and the United States, or that 'the independent and yet concurrent action of the two Governments' have either extended or restricted the terms of the convention of 1818, or affected in any way the right to enforce its provisions according to the plain meaning of the articles of the treaty; on the contrary, a reference to the eighteenth article of the Washington treaty will show that the contracting parties made the convention the basis of the further privileges granted by the treaty, and it does not allege that its provisions are in any way extended or affected by subsequent legislation or acts of administration.

"Mr. Bayard has referred to the proclamation of President Jackson in 1830, creating 'reciprocal commercial intercourse on terms of perfect equality of flag' between the United States and the British American dependencies, and has suggested that these 'commercial privileges have since received a large extension, and that in some cases "favors" have been granted by the United States without equivalent "concession," such as the exemption granted by the shipping act of the 26th June, 1884, amounting to one-half of the regular tonnage dues on all vessels from British North America and West Indies entering ports of the United States.'

"He has also mentioned under this head 'the arrangement for the transit of goods, and the remission by proclamation as to certain British ports and places of the remainder of the tonnage tax on evidence of equal treatment being shown' to United States vessels.

"The proclamation of President Jackson in 1830 had no relation to the subject of the fisheries, and merely had the effect of opening United States ports to British vessels on terms similar to those which had already been granted in British ports to vessels of the United States. The object of these 'laws and regulations' mentioned by Mr. Bayard was purely of a commercial character, while the sole purpose of the convention of 1818 was to establish and define the rights of the citizens of the two countries in relation to the fisheries on the British North American coast.

“ Bearing this distinction in mind, however, it may be conceded that substantial assistance has been given to the development of commercial intercourse between the two countries.

“ But legislation in that direction has not been confined to the Government of the United States, as indeed Mr. Bayard has admitted in referring to the case of the imperial shipping and navigation act of 1849.

“ For upwards of forty years, as has already been stated, Canada has continued to evince her desire for a free exchange of the chief products of the two countries. She has repeatedly urged the desirability of the fuller reciprocity of trade which was established during the period in which the treaty of 1854 was in force.

“ The laws of Canada with regard to the registry of vessels, tonnage dues, and shipping generally, are more liberal than those of the United States. The ports of Canada in inland waters are free to vessels of the United States, which are admitted to the use of her canals on equal terms with Canadian vessels.

“ Canada allows free registry to ships built in the United States and purchased by British citizens, charges no tonnage or light dues on United States shipping, and extends a standing invitation for a large measure of reciprocity in trade by her tariff legislation.

“ Whatever relevancy, therefore, the argument may have to the subject under consideration, the undersigned submits that the concessions which Mr. Bayard refers to as ‘ favors ’ granted by the United States can hardly be said not to have been met by equivalent concessions on the part of the Dominion, and inasmuch as the disposition of Canada continues to be the same, as was evinced in the friendly legislation just referred to, it would seem that Mr. Bayard’s charges of showing ‘ hostility to commerce under the guise of protection to inshore fisheries,’ or of interrupting ordinary commercial intercourse by harsh measures and unfriendly administration, is hardly justified.

“ The questions which were in controversy between Great Britain and the United States prior to 1818 related not to shipping and commerce, but to the claims of United States fishermen to fish in waters adjacent to the British North American provinces.

“ Those questions were definitely settled by the convention of that year, and although the terms of that convention have since been twice suspended, first by the treaty of 1854, and subsequently by that of 1871, after the lapse of each of these two treaties the provisions made in 1818 came again into operation, and were carried out by the Imperial and colonial authorities without the slightest doubt being raised as to their being in full force and vigor.

“ Mr. Bayard’s contention that the effect of the legislation which has taken place under the convention of 1818, and of executive action

thereunder, would be 'to expand the restrictions and renunciations of that treaty which related solely to the inshore fishing within the three-mile limit, so as to affect the deep-sea fisheries,' and 'to diminish and practically destroy the privileges expressly secured to American fishing vessels to visit these inshore waters for the objects of shelter and repair of damages, and purchasing wood and obtaining water,' appears to the undersigned to be unfounded. The legislation referred to in no way affects those privileges, nor has the Government of Canada taken any action towards their restriction. In the cases of the recent seizures, which are the immediate subject of Mr. Bayard's letter, the vessels seized had not resorted to Canadian waters for any one of the purposes specified in the convention of 1818 as lawful. They were United States fishing vessels, and, against the plain terms of the convention, had entered Canadian harbors. In doing so the *David J. Adams* was not even possessed of a permit 'to touch and trade,' even if such a document could be supposed to divest her of the character of a fishing vessel.

"The undersigned is of opinion that while, for the reasons which he has advanced, there is no evidence to show that the Government of Canada has sought to expand the scope of the convention of 1818 or to increase the extent of its restrictions, it would not be difficult to prove that the construction which the United States seeks to place on that convention would have the effect of extending very largely the privileges which their citizens enjoy under its terms. The contention that the changes which may from time to time occur in the habits of the fish taken off our coasts, or in the methods of taking them, should be regarded as justifying a periodical revision of the terms of the treaty, or a new interpretation of its provisions, cannot be acceded to. Such changes may from time to time render the conditions of the contract inconvenient to one party or the other, but the validity of the agreement can hardly be said to depend on the convenience or inconvenience which it imposes from time to time on one or other of the contracting parties. When the operation of its provisions can be shown to have become manifestly inequitable, the utmost that good will and fair dealing can suggest is that the terms should be reconsidered and a new arrangement entered into; but this the Government of the United States does not appear to have considered desirable.

"It is not, however, the case that the convention of 1818 affected only the inshore fisheries of the British provinces; it was framed with the object of affording a complete and exclusive definition of the rights and liberties which the fishermen of the United States were thenceforward to enjoy in following their vocation, so far as those rights could be affected by facilities for access to the shores or waters of the British provinces, or for intercourse with their people. It is

therefore no undue expansion of the scope of that convention to interpret strictly those of its provisions by which such access is denied, except to vessels requiring it for the purposes specifically described.

“Such an undue expansion would, upon the other hand, certainly take place if, under cover of its provisions, or of any agreements relating to general commercial intercourse which may have since been made, permission were accorded to United States fishermen to resort habitually to the harbors of the Dominion, not for the sake of seeking safety for their vessels or of avoiding risk to human life, but in order to use those harbors as a general base of operations from which to prosecute and organize with greater advantage to themselves the industry in which they are engaged.

“It was in order to guard against such an abuse of the provisions of the treaty that amongst them was included the stipulation that not only should the inshore fisheries be reserved to British fishermen, but that the United States should renounce the right of their fishermen to enter the bays or harbors excepting for the four specified purposes, which do not include the purchase of bait or other appliances, whether intended for the deep-sea fisheries or not.

“The undersigned, therefore, cannot concur in Mr. Bayard's contention that ‘to prevent the purchase of bait, or any other supply needed for deep-sea fishing, would be to expand the convention to objects wholly beyond the purview, scope, and intent of the treaty, and to give to it an effect never contemplated.’

“Mr. Bayard suggests that the possession by a fishing vessel of a permit to ‘touch and trade’ should give her a right to enter Canadian ports for other than the purposes named in the treaty, or, in other words, should give her perfect immunity from its provisions. This would amount to a practical repeal of the treaty, because it would enable a United States collector of customs, by issuing a license, originally only intended for purposes of domestic customs regulation, to give exemption from the treaty to every United States fishing vessel. The observation that similar vessels under the British flag have the right to enter the ports of the United States for the purchase of supplies loses its force when it is remembered that the convention of 1818 contained no restriction on British vessels, and no renunciation of any privileges in regard to them.

“Mr. Bayard states that in the proceedings prior to the treaty of 1818 the British commissioners proposed that United States fishing vessels should be excluded ‘from carrying also merchandise,’ but that this proposition ‘being resisted by the American negotiators, was abandoned,’ and goes on to say, ‘this fact would seem clearly to indicate that the business of fishing did not then, and does not now, disqualify vessels from also trading in the regular ports of entry.’ A reference to the proceedings alluded to will show that the proposition

mentioned related only to United States vessels visiting those portions of the coast of Labrador and Newfoundland on which the United States fishermen had been granted the right to fish, and to land for drying and curing fish, and the rejection of the proposal can, at the utmost, be supposed only to indicate that the liberty to carry merchandise might exist without objection in relation to those coasts, and is no ground for supposing that the right extends to the regular ports of entry, against the express words of the treaty.

"The proposition of the British negotiators was to append to Article I the following words: 'It is, therefore, well understood that the liberty of taking, drying, and curing fish, granted in the preceding part of this article, shall not be construed to extend to any privilege of carrying on trade with any of His Britannic Majesty's subjects residing within the limits hereinbefore assigned for the use of the fishermen of the United States.'

"It was also proposed to limit them to having on board such goods as might 'be necessary for the prosecution of the fishery or the support of the fishermen while engaged therein, or in the prosecution of their voyages to and from the fishing grounds.'

"To this the American negotiators objected, on the ground that the search for contraband goods, and the liability to seizure for having them in possession, would expose the fishermen to endless vexation, and, in consequence, the proposal was abandoned. It is apparent, therefore, that this proviso in no way referred to the bays or harbors outside of the limits assigned to the American fishermen, from which bays and harbors it was agreed, both before and after this proposition was discussed, that United States fishing vessels were to be excluded for all purposes other than for shelter and repairs, and purchasing wood and obtaining water.

"If, however, weight is to be given to Mr. Bayard's argument that the rejection of a proposition advanced by either side during the course of the negotiations should be held to necessitate an interpretation adverse to the tenor of such proposition, that argument may certainly be used to prove that American fishing vessels were not intended to have the right to enter Canadian waters for bait to be used even in the prosecution of the deep-sea fisheries. The United States negotiators in 1818 made the proposition that the words 'and bait' be added to the enumeration of the objects for which these fishermen might be allowed to enter, and the proviso as first submitted had read 'provided, however, that American fishermen shall be permitted to enter such bays and harbors for the purpose only of obtaining shelter, wood, water, and bait.' The addition of the two last words was, however, resisted by the British plenipotentiaries, and their omission acquiesced in by their American colleagues. It is, moreover, to be observed that this proposition could only have had reference to the

deep-sea fishing, because the inshore fisheries had already been specifically renounced by the representatives of the United States.

“In addition to this evidence, it must be remembered that the United States Government admitted, in the case submitted by them before the Halifax commission in 1877, that neither the convention of 1818 nor the treaty of Washington conferred any right or privilege of trading on American fishermen. The British case claimed compensation for the privilege which had been given since the ratification of the latter treaty to United States fishing vessels ‘to transfer cargoes, to outfit vessels, buy supplies, obtain ice, engage sailors, procure bait, and traffic generally in British ports and harbors.’

“This claim was, however, successfully resisted, and in the United States case it is maintained ‘that the various incidental and reciprocal advantages of the treaty, such as the privileges of traffic, purchasing bait and other supplies, are not the subject of compensation, because the treaty of Washington confers no such rights on the inhabitants of the United States, who now enjoy them merely by sufferance, and who can at any time be deprived of them by the enforcement of existing laws or the reenactment of former oppressive statutes. Moreover, the treaty does not provide for any possible compensation for such privileges.’

“Now, the existing laws referred to in this extract are the various statutes passed by the imperial and colonial legislatures to give effect to the treaty of 1818, which, it is admitted in the said case, could at any time have been enforced (even during the existence of the Washington treaty), if the Canadian authorities had chosen to do so.

“Mr. Bayard on more than one occasion intimates that the interpretation of the treaty and its enforcement are dictated by local and hostile feelings, and that the main question is being ‘obscured by partisan advocacy and distorted by the heat of local interests,’ and, in conclusion, expresses a hope that ‘ordinary commercial intercourse shall not be interrupted by harsh measures and unfriendly administrations.’

“The undersigned desires emphatically to state that it is not the wish of the Government or the people of Canada to interrupt for a moment the most friendly and free commercial intercourse with the neighboring Republic.

“The mercantile vessels and the commerce of the United States have at present exactly the same freedom that they have for years passed enjoyed in Canada, and the disposition of the Canadian Government is to extend reciprocal trade with the United States beyond its present limits, nor can it be admitted that the charge of local prejudice or hostile feeling is justified by the calm enforcement, through the legal tribunals of the country, of the plain terms of a treaty between Great Britain and the United States, and of the statutes which

have been in operation for nearly seventy years, excepting in intervals during which (until put an end to by the United States Government) special and more liberal provisions existed in relation to the commerce and fisheries of the two countries.

"The undersigned has further to call attention to the letter of Mr. Bayard of the 20th May, relating also to the seizure of the *David J. Adams* in the port of Digby, Nova Scotia.

"That vessel was seized, as has been explained on a previous occasion, by the commander of the Canadian steamer *Lansdowne*, under the following circumstances:

"She was a United States fishing vessel, and entered the harbor of Digby for purposes other than those for which entry is permitted by the treaty and by the imperial and Canadian statutes.

"As soon as practicable, legal process was obtained from the vice-admiralty court at Halifax, and the vessel was delivered to the officer of that court. The paper referred to in Mr. Bayard's letter as having been nailed to her mast was doubtless a copy of the warrant which commanded the marshal or his deputy to make the arrest.

"The undersigned is informed that there was no intention whatever of so adjusting the paper that its contents could not be read, but it is doubtless correct that the officer of the court in charge declined to allow the document to be removed. Both the United States consul-general and the captain of the *David J. Adams* were made acquainted with the reasons for the seizure, and the only ground for the statement that a respectful application to ascertain the nature of the complaint was fruitless, was that the commander of the *Lansdowne*, after the nature of the complaint had been stated to those concerned and was published, and had become notorious to the people of both countries, declined to give the United States consul-general a specific and precise statement of the charges upon which the vessel would be proceeded against, but referred him to his superior.

"Such conduct on the part of the officer of the *Lansdowne* can hardly be said to have been extraordinary under the present circumstances.

"The legal proceedings had at that time been commenced in the court of vice-admiralty at Halifax, where the United States consul-general resides, and the officer at Digby could not have stated with precision, as he was called upon to do, the grounds on which the intervention of the court had been claimed in the proceedings therein.

"There was not, in this instance, the slightest difficulty in the United States consul-general and those interested in the vessel obtaining the fullest information, and no information which could have been given by those to whom they applied was withheld.

"Apart from the general knowledge of the offenses which it was claimed the master had committed, and which was furnished at the



time of the seizure, the most technical and precise details were readily obtainable at the registry of the court, and from the solicitors of the Crown, and would have been furnished immediately on application to the authority to whom the commander of the *Lansdowne* requested the United States consul-general to apply. No such information could have been obtained from the paper attached to the vessel's mast.

"Instructions have, however, been given to the commander of the *Lansdowne* and other officers of the marine police, that, in the event of any further seizure, a statement in writing shall be given to the master of the seized vessel of the offenses for which the vessel may be detained, and that a copy thereof shall be sent to the United States consul-general at Halifax, and to the nearest United States consular agent, and there can be no objection to the solicitor for the Crown being instructed likewise to furnish the consul-general with a copy of the legal process in each case, if it can be supposed that any fuller information will thereby be given.

"Mr. Bayard is correct in his statement of the reasons for which the *David J. Adams* was seized, and is now held. It is claimed that the vessel violated the treaty of 1818, and consequently the statutes which exist for the enforcement of the treaty, and it is also claimed that she violated the customs laws of Canada of 1883.

"The undersigned recommends that copies of those statutes be furnished for the information of Mr. Bayard.

"Mr. Bayard has, in the same dispatch, recalled the attention of Her Majesty's minister to the correspondence and action which took place in the year 1870, when the fishery question was under consideration, and especially to the instructions from the lords of the admiralty to Vice-Admiral Wellesley, in which that officer was directed to observe great caution in the arrest of American fishermen, and to confine his action to one class of offenses against the treaty. Mr. Bayard, however, appears to have attached unwarranted importance to the correspondence and instructions of 1870, when he refers to them as implying 'an understanding between the two Governments,' an understanding, which should, in his opinion, at other times, and under other circumstances, govern the conduct of the authorities, whether imperial or colonial, to whom under the laws of the Empire is committed the duty of enforcing the treaty in question.

"When, therefore, Mr. Bayard points out the 'absolute and instant necessity that now exists for a restriction of the seizure of American vessels charged with violations of the treaty of 1818' to the conditions specified under those instructions, it is necessary to recall the fact that in the year 1870 the principal cause of complaint on the part of Canadian fishermen was that the American vessels were trespassing on the inshore fishing grounds and interfering with the catch

of mackerel in Canadian waters, the purchase of bait being then a matter of secondary importance.

"It is probable, too, that the action of the imperial Government was influenced very largely by the prospect which then existed of an arrangement such as was accomplished in the following year by the treaty of Washington, and that it may be inferred, in view of this disposition made apparent on both sides to arrive at such an understanding, that the imperial authorities, without any surrender of imperial or colonial rights, and without acquiescing in any limited construction of the treaty, instructed the vice-admiral to confine his seizures to the more open and injurious class of offenses which were especially likely to be brought within the cognizance of the naval officers of the imperial service.

"The Canadian Government, as has been already stated, for six months left its fishing grounds open to American fishermen, without any corresponding advantage in return, in order to prevent loss to those fishermen, and to afford time for the action of Congress, on the President's recommendation that a joint commission should be appointed to consider the whole question relating to the fisheries.

"That recommendation has been rejected by Congress. Canadian fish is by prohibitory duties excluded from the United States market. The American fishermen clamor against the removal of those duties, and, in order to maintain a monopoly of the trade, continue against all law to force themselves into our waters and harbors, and make our shores their base for supplies, especially for bait, which is necessary to the successful prosecution of their business.

"They hope by this course to supply the demand for their home market, and thus to make Canada indirectly the means of injuring her own trade.

"It is surely, therefore, not unreasonable that Canada should insist on the rights secured to her by treaty. She is simply acting on the defensive, and no trouble can arise between the two countries if American fishermen will only recognize the provisions of the convention of 1818 as obligatory upon them, and until a new arrangement is made, abstain both from fishing in her waters and from visiting her bays and harbors for any purpose save those specified in the treaty.

"In conclusion, the undersigned would express the hope that the discussion which has arisen on this question may lead to renewed negotiations between Great Britain and the United States, and may have the result of establishing extended trade relations between the Republic and Canada, and of removing all sources of irritation between the two countries."

Report of Mr. Foster, Canadian minister of marine and fisheries, June 14, 1886, enclosed with instructions of Lord Rosebery to Sir L. West, Brit. min. at Washington, of July 23, 1886, and communicated to the Department of State, Aug. 2, 1886, *Ror. Rel.* 1886, 395.

"With reference to a dispatch from the British minister at Washington, to his excellency the governor-general, dated the 21st May last, and inclosing a letter from Mr. Secretary Bayard, regarding the refusal of the collector of customs at Digby, Nova Scotia, to allow the United States schooner *Jennie and Julia* the right of exercising commercial privileges at the said port, the undersigned has the honor to make the following observations:

"It appears the *Jennie and Julia* is a vessel of about 14 tons register, that she was to all intents and purposes a fishing vessel, and, at the time of her entry into the port of Digby, had fishing gear and apparatus on board, and that the collector fully satisfied himself of these facts. According to the master's declaration, she was there to purchase fresh herring only, and wished to get them direct from the weir fishermen. The collector acted upon his conviction that she was a fishing vessel, and, as such, debarred by the treaty of 1818 from entering Canadian ports for the purposes of trade. He, therefore, in the exercise of his plain duty, warned her off.

"The treaty of 1818 is explicit in its terms, and by it United States fishing vessels are allowed to enter Canadian ports for shelter, repairs, wood, and water, and 'for no other purpose whatever.'

"The undersigned is of the opinion that it cannot be successfully contended that a *bona fide* fishing vessel can, by simply declaring her intention of purchasing fresh fish for other than baiting purposes, evade the provisions of the treaty of 1818 and obtain privileges not contemplated thereby. If that were admitted, the provision of the treaty which excludes United States fishing vessels for all purposes but the four above-mentioned, would be rendered null and void, and the whole United States fishing fleet be at once lifted out of the category of fishing vessels, and allowed the free use of Canadian ports for baiting, obtaining supplies, and trans-shipping cargoes.

"It appears to the undersigned that the question as to whether a vessel is a fishing vessel or a legitimate trader or merchant vessel, is one of fact and to be decided by the character of the vessel and the nature of her outfit, and that the class to which she belongs is not to be determined by the simple declaration of her master that he is not at any given time acting in the character of a fisherman.

"At the same time the undersigned begs again to observe that Canada has no desire to interrupt the long-established and legitimate commercial intercourse with the United States, but rather to encourage and maintain it, and that Canadian ports are at present open to the whole merchant navy of the United States on the same liberal conditions as heretofore accorded.

"The whole respectfully submitted.

"GEORGE E. FOSTER,

*"Minister of Marine and Fisheries."*

"OTTAWA, June 5, 1886." (For. Rel. 1886, 404.)

On January 28, 1887, the British minister at Washington communicated to the Department of State a copy of an approved minute of the privy council of Canada of November 2, 1886, accompanied with a report of Mr. J. S. D. Thompson, Canadian minister of justice, of July 22, 1886, in specific reply to the note of Mr. Phelps to Lord

Report of the Canadian minister of justice.

Rosebery of the 2nd of the preceding June. With regard to the allegations of fact made in behalf of the vessel, Mr. Thompson observed that they remained to be proved in the vice-admiralty court at Halifax, and that, as the trial had not been concluded, it was perhaps premature for Mr. Phelps to claim the restoration of the vessel and assert a right to damages for her detention. The vessel, said Mr. Thompson, was on May 5, 1886, at a point several miles within Annapolis Basin, and the suggestion that her captain was under a misapprehension as to the locality could not be sustained. Mr. Phelps, declared Mr. Thompson, was in error in speaking of Digby as "a small fishing settlement, and its harbor not defined." Although some of the people on the neighboring shores engaged in fishing, it was a town with a population of 2,000 inhabitants, and the well-known harbor of Annapolis Basin was entered through a narrow strait called "Digby Gut," marked by conspicuous headlands. During the 5th and 6th of May the vessel lay within the harbor at anchor, about half a mile from shore, and on the second day she purchased and took on board from a near-by fishing weir four and a half barrels of bait. She also obtained two tons of ice. The name of her home port was kept covered by canvas, and the owner of the fishing weir was told that she was under British register.

Other circumstances were also stated by Mr. Thompson contradictory of the allegations made on behalf of the vessel. With regard to her failure to report, Mr. Thompson declared that the vessel, in going to the weir to purchase bait, passed almost within hailing distance of the custom-house at Digby, and that when she was at the weir she was within one or two miles of another custom-house. The captain and crew were also ashore during the 5th and 6th of May. In this relation Mr. Thompson quoted the provisions of the customs act of Canada, which were not, he declared, essentially different from those of the United States; and, after discussing other incidents of the seizure and denying the allegations of harsh or improper action on the part of the Canadian authorities, he repelled the inference of Mr. Phelps that the joining of a charge of violation of the customs law with the charge of violation of the statutes in relation to fishing by foreign vessels, indicated a consciousness that the vessel could not be forfeited on the latter charge. With thousands of miles of coast indented, as were the coasts of Canada, by hundreds of harbors and inlets, it was, said Mr. Thompson, impossible to enforce the fishery law without a strict enforcement of the customs law. The convention of 1818 provided that the American fishermen should be "under such restrictions as might be necessary to prevent their taking, drying, or curing fish . . . or in any other manner whatever abusing the privilege reserved to them." He denied the statement made by Mr. Phelps, on the authority of the United States consul-general at Hali-

**fax**, that it was conceded by the customs authorities at Digby that foreign fishing vessels had for forty years been accustomed to go in and out of the bay at pleasure without being required to report when they had no business with the shore. He admitted, however, that, while the treaties of 1854 and 1871 were in force, and the prohibitions of the convention of 1818 were thus suspended, "considerable laxity," much greater than the treaties entitled them to, was allowed to United States fishing vessels; but he declared that at other times the customs laws were enforced. In this relation he cited the statement of Mr. Vail, Acting Secretary of State in 1839, that numerous seizures had been made for alleged violations of the customs laws<sup>a</sup> and to certain incidents and correspondence in 1870.

With regard to the bait question, as affected by the interpretation of the convention of 1818, Mr. Thompson maintained that by the "clear and unambiguous" words of that convention American vessels were prohibited from entering a Canadian port for any but the four specified purposes, and that there probably were few treaties or statutes the literal enforcement of which might not in certain circumstances produce consequences such as Mr. Phelps had described as "preposterous." This argument, said Mr. Thompson, could at most only suggest that the enforcement of a treaty or statute should not be insisted on where accidental hardships were likely to ensue. Equity and a natural sense of justice would lead a government to refrain from enforcing its rights under such circumstances. It was with a view to such circumstances that provision was made in the law for the intervention of the executive, nor could any authority be found for the position that against the plain words of a treaty or statute an interpretation was to be sought that would obviate all chances of hardship and render unnecessary the exercise of executive interference. In this relation Mr. Thompson contended that it was the purpose of the parties to the convention to prevent the fisheries from being poached on, and to preserve them to British subjects not only for the pursuit of fishing in territorial waters, but also as a base of supplies for the pursuit of fishing in the deep sea. It was, declared Mr. Thompson, a well-known fact that the negotiations preceding the convention "had reference very largely to the deep-sea fisheries, and that the right to purchase bait in the harbors of the British possessions for the deep-sea fishing was one which the United States fishermen were intentionally excluded from." On the point that the early negotiations related largely to the deep-sea fisheries, he cited Schuyler's *American Diplomacy*, 411; on the rules as to the interpretation of treaties, Vattel, lib. II., cap. 17; Sedgwick on the Construction of Statutes, 194; Papers relating to the Treaty of Washington, II. 473;

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<sup>a</sup> Papers relating to the Treaty of Washington, VI. 283.

III. 446, 447. To Mr. Phelps's suggestion that the words "for no other purpose whatever" meant "for no other purpose inconsistent with the provisions of the treaty," Mr. Thompson replied that the words taken in that sense would have no meaning, since no other purpose than those mentioned would be consistent with the treaty; and he also referred to the passage in the case of the United States before the Halifax Commission in 1877, in which it was stated that the privileges of traffic and of purchasing bait and other supplies were not the subject of compensation under the treaty of Washington, because that treaty conferred "no such rights on the inhabitants of the United States, who now enjoy them merely by sufferance, and who can at any time be deprived of them by the enforcement of existing laws or the reenforcement of former oppressive statutes."

With regard to the practical construction of the treaty and of the imperial act of 59 George III, cap. 38, Mr. Thompson argued that the British authorities had not acted on the theory that they permitted the purchase in territorial waters of bait to be used outside. In this relation he referred to the seizure and condemnation of the vessels *Mabby* and *Washington*, in 1818, "for entering and harboring in British-American waters;" of the *Jara*, *Independence*, *Magnolia*, and *Hart*, in 1835, "the principal charge being that they were within British-American waters without legal cause;" of the *Papineau* and *Mary*, in 1840, "for purchasing bait;" of the *Charles*, in New Brunswick, in 1819, "for having resorted to a harbor of that province after warning and without necessity;" and of the *J. H. Nickerson*, in Nova Scotia, in 1871, "for having purchased bait within three marine miles of the Nova Scotian shore."<sup>a</sup> Mr. Thompson added that the decision in the case of the *J. H. Nickerson* was subsequent to that in the case of the *White Fawn*, which was cited by Mr. Phelps. He also denied that the Parliament of Canada had endeavored to alter or enlarge the provisions of the act of the Imperial Parliament, or to give to the convention of 1818 an unwarranted construction; and he maintained the right of the Parliament of Canada in accordance with constitutional forms to legislate for the enforcement of the treaty. He referred to the circulars of the Treasury Department of the United States of May and June, 1870, as having "completely abandoned" the "vain contention" that the colonial statutes were invalid. Mr. Thompson also denied that the Canadian statute of 1886 had been passed in haste, or that it made illegal any act which was legal before. The act, he said, declared what penalty should attach to offenses which were already prohibited, and, he observed, that before the act was passed the Congress of the United States had adopted a statute authorizing the President by proclamation to exclude under

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<sup>a</sup> See proceedings of the Halifax Commission, III. 3398.

penalties the vessels of any foreign country from the exercise in the ports of the United States of such commercial privileges as were denied to American vessels in the ports of such foreign country.\*

Sir L. West, Brit. min., to Mr. Bayard, Sec. of State, Jan. 28, 1887, For. Rel. 1887, 502, enclosing report of Mr. Thompson, Canadian Minister of Justice, of July 22, 1886.

April 25, 1888, the British minister at Washington communicated to the Department of State a copy of a minute of the Canadian privy council, concurring in a recommendation of the minister of justice, who advised that the proceedings against the *David J. Adams* and *Ella M. Doughty*, for violation of the fishery statutes, be discontinued on the understanding that the owners would give an undertaking which would prevent the discontinuance from being made the basis of a claim for damages or expenses. The reason given in the minute for the discontinuance was "that these proceedings were taken for the purpose of asserting and establishing the right of Canada, under the convention of 1818, to prevent the purchase of bait and other fishing supplies in Canadian ports by United States fishing vessels and to prevent such vessels from entering such ports for the shipping of crews;" and that "as the result of the negotiations lately concluded at Washington had been to show that no further difference of opinion between the two Governments on the points was to be apprehended," it appeared to be "unnecessary that a judicial decision should be sought to affirm the right above mentioned."

Sir L. West, British min., to Mr. Bayard, Sec. of State, April 25, 1888. For. Rel. 1888, I. 802.

"The *Everett Steele*, a fishing vessel of Gloucester, Mass., in the United States, of which Charles E. Forbes, an American citizen, was master, was about to enter, on the 10th of September, 1886, the harbor of Shelburne, Nova Scotia, to procure water and for shelter during repairs. She was hailed, when entering the harbor, by the Canadian cutter *Terror*, by whose captain, Quigley, her papers were taken and retained. Captain Forbes, on arriving off the town, anchored and went with Captain Quigley to the custom-house, who asked him whether he reported whenever he had come in. Captain Forbes answered that he had reported always, with the exception of a visit on the 25th of March, when he was driven into the lower harbor for shelter by a storm and where he remained only eight hours. The collector did not consider that this made the vessel liable, but Captain Quigley refused to discharge her; said he would keep her until he heard from Ottawa, put her in charge of policemen, and detained her until the next day,

\* Section 17 of act No. 85, 1886.

when at noon she was discharged by the collector; but a calm having come on she could not get to sea, and by the delay her bait was spoiled, and the expected profits of her trip lost.

"It is scarcely necessary for me to remind you, in presenting this case to the consideration of your Government, that when the north-eastern coast of America was wrested from France in a large measure by the valor and enterprise of New England fishermen, they enjoyed, in common with other British subjects, the control of the fisheries with which that coast was enriched, and that by the treaty of peace of 1783, which, as was said by an eminent English judge when treating an analogous question, was a treaty of 'separation,' this right was expressly affirmed.

"It is true that by the treaty of 1818, the United States renounced a portion of its rights in these fisheries, retaining, however, the old prerogatives of visiting the bays and harbors of the British north-eastern possessions for the purpose of obtaining wood, water, and shelter, and for objects incidental to those other rights of territoriality so retained and confirmed. What is the nature of these incidental prerogatives, it is not, in considering this case, necessary to discuss. It is enough to say that Captain Forbes entered the harbor of Shelburne to obtain shelter and water, and that he had as much right to be there under the treaty of 1818, confirming in this respect the ancient privileges of American fishermen on those coasts, as he would have had on the high seas, carrying on, under shelter of the flag of the United States, legitimate commerce. The Government which you so honorably represent has, with its usual candor and magnanimity, conceded that when a merchant vessel of the United States is stopped in time of peace by a British cruiser on the groundless suspicion of being a slave trader, damages are to be paid to this Government not merely to redress the injury suffered, but as an apology for the insult offered to the flag of the United States. But the case now presented to you is a much stronger one than that of a seizure on the high seas of a ship unjustly suspected of being a slaver. When a vessel is seized on the high seas on such a suspicion, its seizure is not on waters where its rights, based on prior and continuous ownership, are guaranteed by the sovereign making the seizure. If in such case the property of the owners is injured, it is, however wrongful the act, a case of rare occurrence, on seas comparatively unfrequented, with consequences not very far-reaching; and if a blow is struck at a system of which such vessel is unjustly supposed to be a part, such system is one which the civilized world execrates. But seizures of the character of that which I now present to you have no such features. They are made in waters not only conquered and owned by American fishermen, but for the very purpose for which they were being used by Captain Forbes.



guaranteed to them by two successive treaties between the United States and Great Britain.

“ These fishermen also, I may be permitted to remind you, were engaged in no nefarious trade. They pursue one of the most useful and meritorious of industries. They gather from the seas, without detriment to others, a food which is nutritious and cheap, for the use of an immense population. They belong to a stock of men which contributed before the Revolution most essentially to British victories on the northeastern Atlantic, and it may not be out of place to say they have shown since that Revolution, when serving in the Navy of the United States, that they have lost none of their ancient valor, hardihood, and devotion to their flag.

“ The indemnity which the United States has claimed, and which Great Britain has conceded, for the visitation and search of isolated merchantmen seized on remote African seas on unfounded suspicion of being slavers, it can not do otherwise now than claim, with a gravity which the importance of the issue demands, for its fishermen seized on waters in which they have as much right to traverse for shelter as have the vessels by which they are molested. This shelter, it is important to observe, they will as a class be debarred from if annoyances such as I now submit to you are permitted to be inflicted on them by minor officials of the British provinces.

“ Fishermen, as you are aware, have been considered, from the usefulness of their occupation, from their simplicity, from the perils to which they are exposed, and from the small quantity of provisions and protective implements they are able to carry with them, the wards of civilized nations; and it is one of the peculiar glories of Great Britain that she has taken the position—a position now generally accepted—that even in time of war they are not to be the subjects of capture by hostile cruisers. Yet, in defiance of this immunity thus generously awarded by humanity and the laws of nations, the very shelter which they own in these seas, and which is ratified to them by two successive treaties, is to be denied to them, not, I am confident, by the act of the wise, humane, and magnanimous Government you represent, but by deputies of deputies permitted to pursue, not uninfluenced by local rivalry, these methods of annoyance in fishing waters which our fishermen have as much right to visit on lawful errands as those officials have themselves. For let it be remembered that by annoyances and expulsions such as these the door of shelter is shut to American fishermen as a class.

“ If a single refusal of that shelter, such as the present, is sustained, it is a refusal of shelter to all fishermen pursuing their tasks on those inhospitable coasts. Fishermen have not funds enough nor outfit

enough, nor, I may add, recklessness enough to put into harbors where, perfect as is their title, they meet with such treatment as that suffered by Captain Forbes.

• “To sanction such treatment, therefore, is to sanction the refusal to the United States fishermen as a body of that shelter to which they are entitled by ancient right, by the law of nations, and by solemn treaty. Nor is this all. That treaty is a part of a system of mutual concessions. As was stated by a most eminent English judge in the case of *Sutton v. Sutton* (1 Myl. & R. 675), which I have already noticed, it was the principle of the treaty of peace, and of the treaties which followed between Great Britain and the United States, that the ‘subjects of the two parts of the divided Empire should, notwithstanding the separation, be protected in the mutual enjoyment’ of the rights those treaties affirmed. If, as I can not permit myself to believe, Great Britain should refuse to citizens of the United States the enjoyment of the plainest and most undeniable of these rights, the consequences would be so serious that they can not be contemplated by this Government but with the gravest concern.”

Mr. Bayard, Sec. of State, to Sir L. West, British min., Oct. 19, 1886.  
For. Rel. 1886, 419.

On October 20, 1886, Mr. Bayard addressed to the British minister another note complaining of the imposition of a fine on the fishing schooner *Pearl Nelson*, at Arichat. (For. Rel. 1886, 421.)

“The committee of the privy council have had under consideration a dispatch, dated November 22, 1886, from the Secretary of State for the colonies, inclosing letters from Mr. Secretary Bayard, bearing date 19th October, and referring to the cases of the schooners *Pearl Nelson* and *Everett Steele*.

“The minister of marine and fisheries, to whom the dispatch and inclosures were referred, reports that in reply to a telegram from the Secretary of State for the colonies, an order in council, passed on the 18th November last, containing a full statement of facts regarding the detention of the above-named vessels, was transmitted to Mr. Stanhope; it will not therefore be necessary to repeat this statement in the present report.

“The minister observes in the first place that the two fishing schooners *Everett Steele* and *Pearl Nelson* were not detained for any alleged contravention of the treaty of 1818 or the fishery laws of Canada, but solely for the violation of the customs law. By this law all vessels of whatever character are required to report to the collector of customs immediately upon entering port, and are not to break bulk or land crew or cargo before this is done.

“The minister states that the captain of the *Everett Steele* had on a previous voyage entered the port of Shelburne on the 25th March.

1886, and after remaining for eight hours had put to sea again without reporting to the customs. For this previous offense he was, upon entering Shelburne Harbor on the 10th September last, detained and the facts were reported to the minister of customs at Ottawa. With these facts was coupled the captain's statement that on the occasion of the previous offense he had been misled by the deputy harbor-master, from whom he understood that he would not be obliged to report unless he remained in harbor for twenty-four hours. The minister accepted the statement in excuse and the *Everett Steele* was allowed to proceed on her voyage.

"The customs laws had been violated; the captain of the *Everett Steele* admitted the violation, and for this the usual penalty could have been legally enforced. It was, however, not enforced, and no detention of the vessel occurred beyond the time necessary to report the facts to headquarters and obtained the decision of the minister.

"The minister submits that he can not discern in this transaction any attempt to interfere with the privileges of United States fishing vessels in Canadian waters or any sufficient case for the protest of Mr. Bayard.

The minister states that in the case of the *Pearl Nelson* no question was raised as to her being a fishing vessel or her enjoyment of any privileges guaranteed by the treaty of 1818. Her captain was charged with a violation of the customs law, and of that alone, by having, on the day before reporting to the collector of customs at Arichat, landed ten of his crew.

"This he admitted upon oath. When the facts were reported to the minister of customs he ordered that the vessel might proceed upon depositing \$200, pending a fuller examination. This was done, and the fuller examination resulted in establishing the violation of the law and in finding that the penalty was legally enforceable. The minister, however, in consideration of the alleged ignorance of the captain as to what constituted an infraction of the law, ordered the deposit to be refunded.

"In this case there was a clear violation of Canadian law; there was no lengthened detention of the vessel; the deposit was ultimately remitted, and the United States consul-general at Halifax expressed himself by letter to the minister as highly pleased at the result.

"The minister observes that in this case he is at a loss to discover any well-founded grievance or any attempted denial of or interference with any privileges guaranteed to United States fishermen by the treaty of 1818.

"The minister further observes that the whole argument and protest of Mr. Bayard appears to proceed upon the assumption that these two vessels were subjected to unwarrantable interference in that they were called upon to submit to the requirements of Canadian customs

law, and that this interference was prompted by a desire to curtail or deny the privileges of resort to Canadian harbors for the purpose allowed by the treaty of 1818.

"It is needless to say that this assumption is entirely incorrect.

"Canada has a very large extent of seacoast with numberless ports into which foreign vessels are constantly entering for purposes of trade. It becomes necessary in the interests of legitimate commerce that stringent regulations should be made by compulsory conformity to which illicit traffic should be prevented. These customs regulations all vessels of all countries are obliged to obey, and these they do obey, without in any way considering it a hardship. United States fishing vessels come directly from a foreign and not distant country, and it is not in the interests of legitimate Canadian commerce that they should be allowed access to our ports without the same strict supervision as is exercised over all other foreign vessels; otherwise there would be no guaranty against illicit traffic of large dimensions to the injury of honest trade and the serious diminution of the Canadian revenue. United States fishing vessels are cheerfully accorded the right to enter Canadian ports for the purpose of obtaining shelter, repairs, and procuring wood and water; but in exercising this right they are not, and can not be, independent of the customs laws. They have the right to enter for the purposes set forth, but there is only one legal way in which to enter, and that is by conformity to the customs regulations.

"When Mr. Bayard asserts that Captain Forbes had as much right to be in Shelburne Harbor seeking shelter and water 'as he would have had on the high seas carrying on under shelter of the flag of the United States legitimate commerce,' he is undoubtedly right, but when he declares, as he does in reality, that to compel Captain Forbes, in Shelburne Harbor, to conform to Canadian customs regulations, or to punish him for their violation, is a more unwarrantable stretch of power than 'that of seizure on the high seas of a ship unjustly suspected of being a slaver,' he makes a statement which carries with it its own refutation.

"Customs regulations are made by each country for the protection of its own trade and commerce, and are enforced entirely within its own territorial jurisdiction, while the seizure of a vessel upon the high seas, except under extraordinary and abnormal circumstances, is an unjustifiable interference with the free right of navigation common to all nations.

"As to Mr. Bayard's observation that by treatment such as that experienced by the *Everett Steele*, 'the door of shelter is shut to American fishermen as a class,' the minister expresses his belief that Mr. Bayard can not have considered the scope of such an assertion or the inferences which might reasonably be drawn from it.

"If a United States fishing vessel enters a Canadian port for shelter, repairs, or for wood and water, her captain need have no difficulty in reporting her as having entered for one of those purposes, and the *Everett Steele* would have suffered no detention had her captain, on the 25th March, simply reported his vessel to the collector. As it was, the vessel was detained for no longer time than was necessary to obtain the decision of the minister of customs, and the penalty for which it was liable was not enforced. Surely Mr. Bayard does not wish to be understood as claiming for United States fishing vessels total immunity from all customs regulations, or as intimating that if they can not exercise their privileges unlawfully they will not exercise them at all.

"Mr. Bayard complains that the *Pearl Nelson*, although seeking to exercise no commercial privileges, was compelled to pay commercial fees, such as are applicable to trading vessels. In reply the minister observes that the fees spoken of are not 'commercial fees;' they are harbor-master's dues, which all vessels making use of legally constituted harbors are, by law, compelled to pay, and entirely irrespective of any trading that may be done by the vessel.

"The minister observes that no single case has yet been brought to his notice in which any United States fishing vessel has in any way been interfered with for exercising any rights guaranteed under the treaty of 1818 to enter Canadian ports for shelter, repairs, wood, or water; that the Canadian government would not countenance or permit any such interference, and that in all cases of this class when trouble has arisen it has been due to a violation of Canadian customs law, which demands the simple legal entry of the vessel as soon as it comes into port."

Approved report of a committee of the privy council of Canada, embodying a report of the minister of marine and fisheries; communicated to the Government of the United States by the British minister at Washington April 4, 1887, For. Rel. 1887, 517.

See also a dispatch of Lord Lansdowne, governor-general of Canada, to Mr. Stanhope, sec. of state for the colonies, Dec. 20, 1886, *id.* 516.

"On October 7, 1886, the United States fishing vessel, the *Marion Grimes*, of Gloucester, Mass., Alexander Landry, a citizen of the United States, being her captain, arrived shortly before midnight, under stress of weather, at the outer harbor of Shelburne, Nova Scotia. The night was stormy, with a strong head-wind against her, and her sole object was temporary shelter. She remained at the spot where she anchored, which was about seven miles from the port of Shelburne, no one leaving her until 6 o'clock the next morning, when she hoisted sail in order to put to sea. She had scarcely started, however, before she was

Case of the "*Marion Grimes*."

arrested and boarded by a boat's crew from the Canadian cruiser *Terror*. Captain Landry was compelled to proceed to Shelburne, about seven miles distant, to report to the collector. When the report was made, Captain Landry was informed that he was fined \$400 for not reporting on the previous night. He answered that the custom-house was not open during the time that he was in the outer harbor. He further insisted that it was obvious from the storm that caused him to take shelter in that harbor, from the shortness of his stay, and from the circumstances that his equipments were exclusively for deep-sea fishing, and that he had made no effort whatever to approach the shore, that his object was exclusively to find shelter. The fine, however, being imposed principally through the urgency of Captain Quigley, commanding the *Terror*, Captain Landry was informed that he was to be detained at the port of Shelburne until a deposit to meet the fine was made. He consulted Mr. White, the United States consular agent at Shelburne, who at once telegraphed the facts to Mr. Phelan, United States consul-general at Halifax, it being of great importance to Captain Landry, and to those interested in his venture, that he should proceed on his voyage at once. Mr. Phelan then telegraphed to the assistant commissioner of customs at Ottawa that it was impossible for Captain Landry to have reported while he was in the outer harbor on the 8th instant, and asking that the deposit required to release the vessel be reduced. He was told in reply that the minister declined to reduce the deposit, but that it might be made at Halifax. Mr. Phelan at once deposited at Halifax the \$400, and telegraphed to Captain Landry that he was at liberty to go to sea. On the evening of October 11 Mr. Phelan received a telegram from Captain Landry, who had already been kept four days in the port, stating that 'the custom-house officers and Captain Quigley' refused to let him go to sea. Mr. Phelan the next morning called on the collector at Halifax to ascertain if an order had issued to release the vessel, and was informed that the order had been given, 'but that the collector and captain of the cruiser refused to obey it, for the reason that the captain of the seized vessel hoisted the American flag while she was in custody of Canadian officials.' Mr. Phelan at once telegraphed this state of facts to the assistant commissioner at Ottawa, and received in reply, under date of August 12, the announcement that 'collector has been instructed to release the *Grimes* from customs seizure. This department has nothing to do with other charges.' On the same day a dispatch from the commissioner of customs at Ottawa was sent to the collector of customs at Halifax reciting the order to release the *Grimes*, and saying 'this [the customs] department has nothing to do with other charges. It is department of marine.'

“ The facts as to the flag were as follows:

“ On October 11, the *Marion Grimes*, being then under arrest by order of local officials for not immediately reporting at the custom-house, hoisted the American flag. Captain Quigley, who, representing, as appeared, not the revenue, but the marine department of the Canadian administration, was, with his ‘cruiser,’ keeping guard over the vessel, ordered the flag to be hauled down. This order was obeyed; but about an hour afterwards the flag was again hoisted, whereupon Captain Quigley boarded the vessel with an armed crew and lowered the flag himself. The vessel was finally released under orders of the customs department, being compelled to pay \$8 costs in addition to the deposit of \$400 above specified.

“ The seriousness of the damage inflicted on Captain Landry and those interested in his venture will be understood when it is considered that he had a crew of twelve men, with full supplies of bait, which his detention spoiled.

“ You will at once see that the grievances I have narrated fall under two distinct heads.

“ The first concerns the boarding by Captain Quigley of the *Marion Grimes* on the morning of October 8th, and compelling her to go to the town of Shelburne, there subjecting her to a fine of \$400 for visiting the port without reporting, and detaining her there arbitrarily four days, a portion of which time was after a deposit to meet the fine had been made.

“ This particular wrong I now proceed to consider with none the less gravity, because other outrages of the same class have been perpetrated by Captain Quigley. On August 18th last I had occasion, as you will see by the annexed papers, to bring to the notice of the British minister at this capital several instances of aggression on the part of Captain Quigley on our fishing vessels. On October 19, 1886, I had also to bring to the British minister’s notice the fact that Captain Quigley had, on September the 10th, arbitrarily arrested the *Everett Steele*, a United States fishing vessel, at the outer port of Shelburne. To these notes I have received no reply. Copies are transmitted, with the accompanying papers, to you in connection with the present instruction, so that the cases, as part of a class, can be presented by you to Her Majesty’s Government.

“ Were there no treaty relations whatever between the United States and Great Britain, were the United States fishermen without any other right to visit those coasts than are possessed by the fishing craft of any foreign country simply as such, the arrest and boarding of the *Grimes*, as above detailed, followed by forcing her into the port of Shelburne, there subjecting her to fine for not reporting, and detaining her until her bait and ice were spoiled, are wrongs

which I am sure Her Majesty's Government will be prompt to redress. No Governments have been more earnest and resolute in insisting that vessels driven by stress of weather into foreign harbors should not be subject to port exactions than the Governments of Great Britain and the United States. So far has this solicitude been carried that both Governments, from motives of humanity, as well as of interest as leading maritime powers, have adopted many measures by which foreigners as well as citizens or subjects arriving within their territorial waters may be protected from the perils of the sea. For this purpose not merely light-houses and light-ships are placed by us at points of danger, but an elaborate life-saving service, well equipped with men, boats, and appliances for relief, studs our seaboard in order to render aid to vessels in distress, without regard to their nationality. Other benevolent organizations are sanctioned by Government which bestow rewards on those who hazard their lives in the protection of life and property in vessels seeking in our waters refuge from storms. Acting in this spirit the Government of the United States has been zealous, not merely in opening its ports freely, without charges to vessels seeking them in storm, but in insisting that its own vessels, seeking foreign ports under such circumstances, and exclusively for such shelter, are not under the law of nations subject to custom-house exactions.

“In cases of vessels carried into British ports by violence or stress of weather [said Mr. Webster in instructions to Mr. Everett, June 28, 1842] we insist that there shall be no interference from the land with the relation or personal condition of those on board, according to the laws of their own country; that vessels under such circumstances shall enjoy the common laws of hospitality, subjected to no force, entitled to have their immediate wants and necessities relieved, and to pursue their voyage without molestation.’

“In this case, that of the *Creole*, Mr. Wheaton, in the *Revue Française et Étrangère* (IX. 345), and Mr. Legaré (4 Op. At. Gen. 98), both eminent publicists, gave opinions that a vessel carried by stress of weather or forced into a foreign port is not subject to the law of such port; and this was sustained by Mr. Bates, the umpire of the commission to whom the claim was referred (Rep. Com. of 1853, 244, 245):

“The municipal law of England [so he said] cannot authorize a magistrate to violate the law of nations by invading with an armed force the vessel of a friendly nation that has committed no offense, and forcibly dissolving the relations which, by the laws of his country, the captain is bound to preserve and enforce on board. These rights, sanctioned by the law of nations, viz, the right to navigate the ocean and to seek shelter in case of distress or other unavoidable circum-



stances, and to retain over the ship, her cargo, and passengers, the law of her country, must be respected by all nations, for no independent nation would submit to their violation.'

"It is proper to state that Lord Ashburton, who conducted the controversy in its diplomatic stage on the British side, did not deny as a general rule the propositions of Mr. Webster. He merely questioned the applicability of the rule in the case of the *Creole*. Nor has the principle ever been doubted by either Her Majesty's Government or the Government of the United States; while, in cases of vessels driven by storm on inhospitable coasts, both Governments have asserted it, sometimes by extreme measures of redress, to secure indemnity for vessels suffering under such circumstances from port exactions, or from injuries inflicted from the shore.

"It would be hard to conceive of anything more in conflict with the humane policy of Great Britain in this respect, as well as with the law of nations, than was the conduct of Captain Quigley toward the vessel in question on the morning of October 8th.

"In such coasts, at early dawn, after a stormy night, it is not unusual for boats, on errands of relief, to visit vessels which have been struggling with storm during the night. But in no such errand of mercy was Captain Quigley engaged. The *Marion Grimes*, having found shelter during the night's storm, was about to depart on her voyage, losing no time while her bait was fresh and her ice lasted, when she was boarded by an armed crew, forced to go 7 miles out of her way to the port, and was there under pressure of Captain Quigley, against the opinion originally expressed of the collector, subjected to a fine of \$400 with costs, and detained there, as I shall notice hereafter, until her voyage was substantially broken up. I am confident Her Majesty's Government will concur with me in the opinion that, as a question of international law, aside from treaty and other rights, the arrest and detention under the circumstances of Captain Landry and of his vessel were in violation of the law of nations as well as the law of humanity, and that on this ground alone the fine and the costs should be refunded and the parties suffering be indemnified for their losses thereby incurred.

"It is not irrelevant, on such an issue as the present, to inquire into the official position of Captain Quigley, 'of the Canadian cruiser *Terror*.' He was, as the term 'Canadian cruiser' used by him enables us to conclude, not an officer in Her Majesty's distinctive service. He was not the commander of a revenue cutter, for the head of the customs service disavowed him. Yet he was arresting and boarding, in defiance of law, a vessel there seeking shelter, over-influencing the collector of the port into the imposition of a fine, hauling down with his own hand the flag of the United States, which was displayed over

the vessel, and enforcing arbitrarily an additional period of detention after the deposit had been made, simply because the captain of the vessel refused to obey him by executing an order insulting to the flag which the vessel bore. If armed cruisers are employed in seizing, harassing, and humiliating storm-bound vessels of the United States on Canadian coasts, breaking up their voyages and mulcting them with fines and costs, it is important for reasons presently to be specified that this Government should be advised of the fact.

"From Her Majesty's Government redress is asked. And that redress, as I shall have occasion to say hereafter, is not merely the indemnification of the parties suffering by Captain Quigley's actions, but his withdrawal from the waters where the outrages I represent to you have been committed.

"I have already said that the claims thus presented could be abundantly sustained by the law of nations, aside from treaty and other rights. But I am not willing to rest the case on the law of nations. It is essential that the issue between the United States fishing vessels and the 'cruiser *Terror*' should be examined in all its bearings, and settled in regard not merely to the general law of nations, but to the particular rights of the parties aggrieved.

"It is a fact that the fishing vessel *Marion Grimes* had as much right under the special relations of Great Britain and the United States to enter the harbor of Shelburne as had the Canadian cruiser. The fact that the *Grimes* was liable to penalties for the abuse of such right of entrance does not disprove its existence. Captain Quigley is certainly liable to penalties for his misconduct on the occasion referred to. Captain Landry was not guilty of misconduct in entering and seeking to leave that harbor, and had abused no privilege. But whether liable or no for subsequent abuse of the rights, I maintain that the right of free entrance into that port, to obtain shelter, and whatever is incident thereto, belonged as much to the American fishing vessel as to the Canadian cruiser.

"The basis of this right is thus declared by an eminent jurist and statesman, Mr. R. R. Livingston, the first Secretary of State appointed by the Continental Congress, in instructions issued on January 7, 1782, to Dr. Franklin, then at Paris, intrusted by the United States with the negotiation of articles of peace with Great Britain:

"The arguments on which the people of America found their claim to fish on the banks of Newfoundland arise, first, from their having once formed a part of the British Empire, in which state they always enjoyed as fully as the people of Britain themselves the right of fishing on those banks. They have shared in all the wars for the extension of that right, and Britain could with no more justice have excluded them from the enjoyment of it (even supposing that one

nation could possess it to the exclusion of another) while they formed a part of that Empire than they could exclude the people of London or Bristol. If so, the only inquiry is, how have we lost that right? If we were tenants in common with Great Britain while united with her, we still continue so, unless by our own act we have relinquished our title. Had we parted with mutual consent, we should doubtless have made partition of our common rights by treaty. But the oppressions of Great Britain forced us to a separation (which must be admitted, or we have no right to be independent); and it can not certainly be contended that those oppressions abridged our rights or gave new ones to Britain. Our rights, then, are not invalidated by this separation, more particularly as we have kept up our claim from the commencement of the war, and assigned the attempt of Great Britain to exclude us from the fisheries, as one of the causes of our recurring to arms.'

"As I had occasion to show in my note to the British minister in the case of the *Everett Steele*, of which a copy is hereto annexed, this 'tenancy in common,' held by citizens of the United States in the fisheries, they were to 'continue to enjoy' under the preliminary articles of 1782, as well as under the treaty of peace of 1783; and this right, as a right of entrance in those waters, was reserved to them, though with certain limitations in its use, by the treaty of 1818. I might here content myself with noticing that the treaty of 1818, herein reciting a principle of the law of nations as well as ratifying a right previously possessed by fishermen of the United States, expressly recognizes the right of these fishermen to enter the 'bays or harbors' of Her Majesty's Canadian dominions, 'for the purpose of shelter and of repairing damages therein.' The extent of other recognitions of rights in the same clause need not here be discussed. At present it is sufficient to say that the placing an armed cruiser at the mouth of a harbor in which the United States fishing vessels are accustomed and are entitled to seek shelter on their voyages, such cruiser being authorized to arrest and board our fishing vessels seeking such shelter, is an infraction not merely of the law of nations, but of a solemn treaty stipulation. That, so far as concerns the fishermen so affected, its consequences are far-reaching and destructive, it is not necessary here to argue. Fishing vessels only carry provisions enough for each particular voyage. If they are detained several days on their way to the fishing banks the venture is broken up. The arrest and detention of one or two operates upon all. They cannot as a class, with their limited capital and resources, afford to run risks so ruinous. Hence, rather than subject themselves to even the chances of suffering the wrongs inflicted by Captain Quigley, 'of the Canadian cruiser *Terror*,' on some of their associates, they might pre-

fer to abandon their just claim to the shelter consecrated to them alike by humanity, ancient title, the law of nations, and by treaty, and face the gravest peril and the wildest seas in order to reach their fishing grounds. You will therefore represent to Her Majesty's Government that the placing Captain Quigley in the harbor of Shelburne to inflict wrongs and humiliation on United States fishermen there seeking shelter is, in connection with other methods of annoyance and injury, expelling United States fishermen from water-access to which, of great importance in the pursuit of their trade, is pledged to them by Great Britain, not merely as an ancient right, but as part of a system of international settlement.

"It is impossible to consider such a state of things without grave anxiety. You can scarcely represent this too strongly to Her Majesty's Government.

"It must be remembered, in considering this system, so imperiled, that the preliminaries to the article of 1782, afterwards adopted as the treaty of 1783, were negotiated at Paris by Dr. Franklin, representing the United States, and Mr. Richard Oswald, representing Lord Shelburne, then colonial secretary, and afterwards, when the treaty was finally agreed on, prime minister. It must be remembered, also, that Lord Shelburne, while maintaining the rights of the colonies when assailed by Great Britain, was nevertheless unwilling that their independence should be recognized prior to the treaty of peace, as if it were a concession wrung from Great Britain by the exigencies of war. His position was that this recognition should form part of a treaty of partition, by which, as is stated by the court in *Sutton v. Sutton* (1 Rus. & M. 675), already noticed by me, the two great sections of the British Empire agreed to separate, in their articles of separation recognizing to each other's citizens or subjects certain territorial rights. Thus the continuance of the rights of the United States in the fisheries was recognized and guaranteed; and it was also declared that the navigation of the Mississippi, whose sources were, in the imperfect condition of geographical knowledge of that day, supposed to be in British territory, should be free and open to British subjects and to citizens of the United States. Both powers also agreed that there should be no further prosecutions or confiscations based on the war; and in this way were secured the titles to property held in one country by persons remaining loyal to the other. This was afterwards put in definite shape by the following article (Article X.) of Jay's treaty:

"It is agreed that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominion of His Majesty, shall continue to hold them according to the nature and tenure of their respective estates and

titles therein, and may grant, sell, or devise the same to whom they please in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as aliens.'

"It was this article which the court in *Sutton v. Sutton*, above referred to, held to be one of the incidents of the 'separation' of 1783, of perpetual obligation, unless rescinded by the parties, and hence not abrogated by the war of 1812.

"It is not, however, on the continuousness of the reciprocities, recognized by the treaty of 1783, that I desire now to dwell. What I am anxious you should now impress upon the British Government is the fact that, as the fishery clause in this treaty, a clause continued in the treaty of 1818, was a part of a system of reciprocal recognitions which are interdependent, the abrogation of this clause, not by consent, but by acts of violence and of insult, such as those of the Canadian cruiser *Terror*, would be fraught with consequences which I am sure could not be contemplated by the Governments of the United States and Great Britain without immediate action being taken to avert them. To the extent of the system thus assailed I now direct attention.

"When Lord Shelburne and Dr. Franklin negotiated the treaty of peace, the area on which its recognitions were to operate was limited. They covered, on the one hand, the fisheries; but the map of Canada in those days, as studied by Lord Shelburne, gives but a very imperfect idea of the territory near which the fisheries lay. Halifax was the only port of entry on the coast; the New England States were there and the other nine provinces, but no organized governments to the west of them. It was on this area only, as well as on Great Britain, that the recognitions and guarantees of the treaty were at first to operate. Yet comparatively small as this field may now seem, it was to the preservation over it of certain reciprocal rights that the attention of the negotiators was mainly given. And the chief of these rights were: (1) the fisheries, a common enjoyment in which by both parties took nothing from the property of either; and (2) the preservation to the citizens or subjects of each country of title to property in the other.

"Since Lord Shelburne's premiership this system of reciprocity and mutual convenience has progressed under the treaties of 1842 and 1846, so as to give to Her Majesty's subjects, as well as to citizens of the United States, the free use of the river Detroit on both sides of the island Bois Blanc, and between that island and the American and Canadian shores, and all the several channels and passages between the various islands lying near the junction of the river St. Clair with the lake of that name. By the treaty of 1846 the prin-

ciple of common border privileges was extended to the Pacific Ocean. The still existing commercial articles of the treaty of 1871 further amplified those mutual benefits by embracing the use of the inland waterways of either country, and defining enlarged privileges of bonded transit by land and water through the United States for the benefit of the inhabitants of the Dominion. And not only by treaties has the development of Her Majesty's American dominion, especially to the westward, been aided by the United States, but the vigorous contemporaneous growth under the enterprise and energy of citizens of the Northwestern States and Territories of the United States has been productive of almost equal advantages to the adjacent possessions of the British Crown, and the favoring legislation by Congress has created benefits in the way of railway facilities which under the sanction of State laws have been and are freely and beneficially enjoyed by the inhabitants of the Dominion and their Government.

"Under this system of energetic and cooperative development the coast of the Pacific has been reached by the transcontinental lines of railway within the territorial limits of the respective countries, and, as I have stated, the United States being the pioneers in this remarkable progress, have been happily able to anticipate and incidentally to promote the subsequent success of their neighbors in British America.

"It will be scarcely necessary for you to say to Lord Iddesleigh that the United States, in thus aiding in the promotion of the prosperity, and in establishing the security of Her Majesty's Canadian dominions, claims no particular credit. It was prompted, in thus opening its territory to Canadian use, and incidentally for Canadian growth, in large measure by the consciousness that such good offices are part of a system of mutual convenience and advantage growing up under the treaties of peace and assisted by the natural forces of friendly contiguity. Therefore it is that we witness with surprise and painful apprehension the United States fishermen hampered in their enjoyment of their undoubted rights in the fisheries.

"The hospitalities of Canadian coasts and harbors, which are ours by ancient right, and which these treaties confirm, cost Canada nothing and are productive of advantage to her people. Yet, in defiance of the most solemn obligations, in utter disregard of the facilities and assistances granted by the United States, and in a way especially irritating, a deliberate plan of annoyances and aggressions has been instituted and plainly exhibited during the last fishing season—a plan calculated to drive these fishermen from shores where, without injury to others, they prosecute their own legitimate and useful industry.

"It is impossible not to see that if the unfriendly and unjust system, of which the cases now presented are part, is sustained by Her Majesty's Government, serious results will almost necessarily ensue,

great as is the desire of this Government to maintain the relations of good neighborhood. Unless Her Majesty's Government shall effectually check these aggressions a general conviction on the part of the people of the United States may naturally be apprehended that, as treaty stipulations in behalf of our fishermen, based on their ancient rights, cease to be respected, the maintenance of the comprehensive system of mutual commercial accommodation between Canada and the United States could not reasonably be expected.

"In contemplation of so unhappy and undesirable a condition of affairs I express the earnest hope that Her Majesty's Government will take immediate measures to avert its possibility.

"With no other purpose than the preservation of peace and good will and the promotion of international amity, I ask you to represent to the statesmen charged with the administration of Her Majesty's Government the necessity of putting an end to the action of Canadian officials in excluding American fishermen from the enjoyment of their treaty rights in the harbors and waters of the maritime provinces of British North America.

"The action of Captain Quigley in hauling down the flag of the United States from the *Marion Grimes* has naturally aroused much resentment in this country, and has been made the subject of somewhat excited popular comment; and it is wholly impossible to account for so extraordinary and unwarranted an exhibition of hostility and disrespect by that official. I must suppose that only his want of knowledge of what is due to international comity and propriety and overheated zeal as an officer of police could have permitted such action; but I am confident that, upon the facts being made known by you to Her Majesty's Government, it will at once be disavowed, a fitting rebuke be administered, and the possibility of a repetition of Captain Quigley's offense be prevented.

"It seems hardly necessary to say that it is not until after condemnation by a prize court that the national flag of a vessel seized as a prize of war is hauled down by her captor. Under the fourteenth section of the twentieth chapter of the Navy Regulations of the United States the rule in such cases is laid down as follows:

"A neutral vessel, seized, is to wear the flag of her own country until she is adjudged to be a lawful prize by a competent court."

"But, *a fortiori*, is this principle to apply in cases of customs seizures, where fines only are imposed and where no belligerency whatever exists. In the port of New York, and other of the countless harbors of the United States, are merchant vessels to-day flying the British flag which from time to time are liable to penalties for violations of customs laws and regulations. But I have yet to learn that any official, assuming, directly or indirectly, to represent the Govern-

ment of the United States, would under such circumstances order down or forcibly haul down the British flag from a vessel charged with such irregularity; and I now assert that if such act were committed, this Government, after being informed of it, would not wait for a complaint from Great Britain, but would at once promptly reprimand the parties concerned in such misconduct and would cause proper expression of regret to be made.

"A scrupulous regard for international respect and courtesy should mark the intercourse of the officials of these two great and friendly nations, and anything savoring of the contrary should be unhesitatingly and emphatically rebuked. I cannot doubt that these views will find ready acquiescence from those charged with the administration of the Government of Great Britain.

"You are at liberty to make Lord Iddesleigh acquainted with the contents of this letter, and, if desired, leave with him a copy."

Mr. Bayard, Sec. of State, to Mr. Phelps, mln. to England, No. 452, Nov. 6, 1886, For. Rel. 1886, 362.

December 7, 1886, the British minister at Washington, by direction of the Earl of Iddesleigh, communicated to the Department of State a dispatch from the acting Governor-General of Canada, "expressing the regret of the Dominion government at the action of the captain of the Canadian cutter *Terror* in lowering the United States flag from the United States fishing schooner *Marion Grimes*," while she was under detention at Shelburne.

The dispatch of the Acting Governor-General inclosed a copy of an approved minute of the privy council of Canada, reading as follows:

"On a report, dated the 14th October, from the Hon. Mackenzie Bowell, for the minister of marine and fisheries, stating that on Monday, the 11th October instant, the United States fishing schooner *Marion Grimes*, of Gloucester, Mass., was under detention at Shelburne, Nova Scotia, by the collector of customs at that port for an infraction of the customs regulations; that while so detained, and under the surveillance of the Canadian government cutter *Terror*, the captain of the *Marion Grimes* hoisted the United States flag.

"The minister further states that it appears that Capain Quigley, of the *Terror*, considered such act as an intimation that there was an intention to rescue the vessel, and requested Captain Landry to take the flag down. This request was complied with. An hour later, however, the flag was again hoisted, and on Captain Landry being asked if his vessel had been released, and replying that she had not, Captain Quigley again requested that the flag be lowered. This was refused, when Captain Quigley himself lowered the flag, acting under the belief that while the *Marion Grimes* was in posses-



sion of the customs authorities, and until her case had been adjudicated upon, the vessel had no right to fly the United States flag.

"The minister regrets that he should have acted with undue zeal, although Captain Quigley may have been technically within his right while the vessel was in the custody of the law.

"The committee advise that your excellency be moved to forward a copy of this minute, if approved, to the right honorable the secretary of state for the colonies, and to Her Majesty's minister at Washington, expressing the regret of the Canadian government at the occurrence."

A copy of the British minister's note and of the accompanying papers were sent to the legation of the United States at London, with an instruction saying: "As this occurrence had been made the subject of an instruction to you by me, on the 6th ultimo, whereby you were requested to bring the incident to the attention of Her Majesty's Government, I hasten to inform you of the voluntary action of the Canadian government and of their expression of regret for the action of the officer referred to."

Mr. Bayard, Sec. of State, to Mr. Phelps, min. to England, Dec. 13, 1886, For. Rel. 1887, 451.

The note of the British minister of December 7, 1886, is printed in Foreign Relations, 1886, 491.

By an act of Congress approved March 3, 1887, it was provided that whenever the President should be satisfied that **Retaliatory act,** American fishing vessels or fishermen were or then **1887.** lately had been "denied or abridged" in the waters of the British dominions of North America in the enjoyment of any rights secured to them by treaty or law, or unjustly vexed or harassed in the enjoyment of such rights, or subjected in respect thereof to unreasonable restrictions, regulations, or requirements, or otherwise unjustly vexed or harassed; or that any such vessels or fishermen, having a permit under the laws of the United States to touch and trade, were or then lately had been denied the privilege of entering in the same manner as trading vessels of the most favored nation, or were unjustly vexed or harassed in the matter, or prevented from purchasing such supplies as might be lawfully sold to trading vessels of the most favored nation; or that any other United States vessels, their masters or crews, were or then lately had been denied any of the privileges accorded in such dominions to vessels, masters, or crews of the most favored nation, or were unjustly vexed or harassed in respect thereof, it should in any or all of such cases be the duty of the President, in his discretion, by proclamation to deny to vessels,

their masters and crews, of the British dominions of North America any entrance into the waters of the United States (with such exceptions in regard to distress or need of supplies as should seem proper). and also to deny entry of fresh fish or salt fish or any other product of the dominions in question or other goods coming from such dominions into the United States. The President was authorized, in his discretion, to apply his proclamation to any or all of the subject-specified, and to revoke, qualify, or renew it from time to time as he might deem necessary to the full and just execution of the purposes of the act. The penalty of forfeiture was prescribed for any entrance of vessels and goods contrary to proclamation, while every person violating the provisions of the act or of any proclamation under it was to be deemed guilty of a misdemeanor, punishable with a fine not exceeding \$1,000 or by imprisonment of not more than two years, or by both, in the discretion of the court.<sup>a</sup>

For lists of vessels seized, see S. Ex. Doc. 55, 49 Cong. 2 sess.; S. Mis. Doc. 54, 49 Cong. 2 sess.; H. Report 4087, 49 Cong. 2 sess. 27-34; Confid. S. Rep. 3, 50 Cong. 1 sess. 45-60.

See report of Mr. Belmont, Committee on Foreign Affairs, Jan. 18, 1887. H. Report 3648, 49 Cong. 2 sess.; res. of Mr. Gorman, Jan. 18, 1887. S. Mis. Doc. 33, 49 Cong. 2 sess.; report of Mr. Edmunds, Committee on Foreign Relations, Jan. 19, 1887, S. Rep. 1683, 49 Cong. 2 sess. part 1, pp. xvi. 280; part 2, pp. 95, with maps; report of Mr. Belmont, Com. on For. Aff., Feb. 16, 1887, H. Report 4087, 49 Cong. 2 sess., report of Messrs. Edmunds, Frye, and Morgan, Com. on For. Rel., Feb. 28, 1887, S. Rep. 1981, 49 Cong. 2 sess.

See, also, message of Feb. 8, 1887, H. Ex. Doc. 153, 49 Cong. 2 sess.; S. Ex. Doc. 73, 50 Cong. 1 sess.; Consular Reports, No. 77, April, 1887.

#### 6. UNRATIFIED TREATY, 1888.

#### § 168.

The President, in the exercise of his discretion under the foregoing act, continued the negotiations for an adjustment. They resulted in the meeting of representatives of the United States and Great Britain in conference at Washington, November 22, 1887.<sup>b</sup> On February 15, 1888, a treaty was signed, and on the same day communications were exchanged which were designed to provide, for a period not exceeding two years, a *modus vivendi* pending the ratification of the treaty.<sup>c</sup>

By the treaty provision was made for the delimitation of what were to be considered as exclusively British waters under the convention of

<sup>a</sup> 24 Stat. 475; For. Rel. 1887, 406.

<sup>b</sup> See, particularly, S. Ex. Doc. 113, 50 Cong. 1 sess. 56-65, 112-119.

<sup>c</sup> H. Ex. Doc. 434, 50 Cong. 1 sess. 9-20. See, also, S. Ex. Doc. 127, 50 Cong. 1 sess.

October 20, 1818.<sup>a</sup> It was agreed that the three marine miles under that convention should be measured seaward from low-water mark, and that at bays, creeks, and harbors the distance should, except where it was otherwise provided, be measured from a straight line drawn across the part nearest the entrance, at the first point where the width did not exceed ten marine miles.<sup>b</sup> Specific stipulations, however, were made as to the line in the Baie des Chaleurs, Bay of Miramichi, Egmont Bay, St. Ann's Bay, Fortune Bay, Sir Charles Hamilton Sound, Barrington Bay, Chedabucto and St. Peter's bays, Mira Bay, Placentia Bay, and St. Mary's Bay.<sup>c</sup>

It was provided that United States fishing vessels entering the bays or harbors in question should conform to harbor regulations common to them and to fishing vessels of Canada or of Newfoundland; that they need not report, enter, or clear when putting into such bays or harbors for shelter or repairing damages, nor when putting in outside the limits of established ports of entry for the purpose of purchasing wood or of obtaining water, unless they remained in port more than twenty-four hours, exclusive of Sundays or legal holidays, or communicated with the shore therein; that they should not be liable in such bays or harbors for compulsory pilotage, nor, when putting in for the purpose of shelter, of repairing damages, of purchasing wood, or of obtaining water, for harbor dues, tonnage dues, buoy dues, light dues, or other similar dues;<sup>d</sup> that they might, when entering under stress of weather or other casualty, unload, reload, transship, or sell, subject to customs laws and regulations, all fish on board, when necessary as incidental to repairs, and might replenish outfits, provisions, and supplies damaged or lost by disaster, and, in case of death or sickness, enjoy all needful facilities, including the shipping of crews; that licenses to purchase, for the homeward voyage, such provisions and supplies as were ordinarily sold to trading vessels should be granted to United States fishing vessels promptly and without charge; that such vessels, having obtained licenses in this manner, should "also be accorded upon all occasions such facilities for the purchase of casual or needful provisions and supplies as are ordinarily granted to trading vessels," but that such provisions or supplies should not be obtained by barter, nor purchased for resale or traffic;<sup>e</sup> and that fishing vessels of Canada and Newfoundland should have on the Atlantic coast of the United States all the privileges secured by the treaty to American fishing vessels in Canada and Newfoundland. The Secretary of the Treasury was to make regulations for the conspicuous exhibition by every United States fishing vessel of an official number on each bow.<sup>f</sup>

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<sup>a</sup> Arts. I.-VIII.<sup>b</sup> Art. III.<sup>c</sup> Art. IV.<sup>d</sup> Art. X.<sup>e</sup> Art. XI.<sup>f</sup> Art. XIII.

It was stipulated that the penalties for "unlawfully fishing" in prohibited waters might extend to forfeiture of the vessel and cargo, and that, for "preparing in such waters to unlawfully fish therein," the penalty should be fixed by the court, not to exceed those for unlawfully fishing; and that for any other violation of the fishery laws the penalty should be fixed by the court, not to exceed three dollars a ton of the vessel concerned. Trial, except on appeal, was to be at the place of detention, unless the judge should, on the request of the defence, order it to be held elsewhere. There were to be proper appeals available to the defense only; and judgments of forfeiture were to be reviewed by the governor-general of Canada in council, or the governor in council of Newfoundland, before being executed.<sup>a</sup>

Finally, it was stipulated that whenever the United States should remove the duty from the fishery products of Canada and Newfoundland, the like products of fisheries carried on by fishermen of the United States should be admitted free of duty into Canada and Newfoundland; and that, upon such removal of duties, and so long as it should last, the privilege of entering Canadian and Newfoundland ports, bays, and harbors should be accorded to United States fishing vessels by annual licenses, free of charge, for the purposes of (1) the purchase of provisions, bait, ice, seines, lines, and all other supplies and outfits; (2) transshipment of catch, for transport by any means of conveyance; (3) shipping of crews. It was further stipulated that supplies should not be obtained by barter, but that bait might be so obtained; and that the like privileges should be given to Canadian and Newfoundland fishing vessels on the Atlantic coasts of the United States.<sup>b</sup>

After the signature of the treaty the British plenipotentiaries presented the following paper:

**Modus vivendi.**

"The treaty having been signed, the British plenipotentiaries desire to state that they have been considering the position which will be created by the immediate commencement of the fishing season before the treaty can possibly be ratified by the Senate of the United States, by the parliament of Canada, and the legislature of Newfoundland.

"In the absence of such ratification the old conditions, which have given rise to so much friction and irritation, might be revived, and might interfere with the unprejudiced consideration of the treaty by the legislative bodies concerned.

"Under these circumstances, and with the further object of affording evidence of their anxious desire to promote good feeling and to

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<sup>a</sup> Art. XIV.

<sup>b</sup> Art. XV.

remove all possible subjects of controversy, the British plenipotentiaries are ready to make the following temporary arrangement for a period not exceeding two years, in order to afford a '*modus vivendi*' pending the ratification of the treaty:

"1. For a period not exceeding two years from the present date, the privilege of entering the bays and harbors of the Atlantic coasts of Canada and Newfoundland shall be granted to United States fishing vessels by annual licenses at a fee of \$1.50 per ton for the following purposes:

"The purchase of bait, ice, seines, lines, and all other supplies and outfits.

"Transshipment of catch and shipping of crews.

"2. If during the continuance of this arrangement the United States should remove the duties on fish, fish-oil, whale and seal-oil (and their coverings, packages, etc.), the said licenses shall be issued free of charge.

"3. United States fishing vessels entering the bays and harbors of the Atlantic coasts of Canada or of Newfoundland for any of the four purposes mentioned in Article I. of the convention of October 20, 1818, and not remaining therein more than twenty-four hours, shall not be required to enter or clear at the custom-house, providing that they do not communicate with the shore.

"4. Forfeiture to be exacted only for the offences of fishing or preparing to fish in territorial waters.

"5. This arrangement to take effect as soon as the necessary measures can be completed by the colonial authorities.

"J. CHAMBERLAIN.

"L. S. SACKVILLE WEST.

"CHARLES TUPPER.

"WASHINGTON, *February 15, 1888.*"

To this communication the American plenipotentiaries made the following reply:

"The American plenipotentiaries having received the communication of the British plenipotentiaries of this date conveying their plan for the administration to be observed by the governments of Canada and Newfoundland in respect to the fisheries during the period which may be requisite for the consideration by the Senate of the treaty this day signed, and the enactment of the legislation by the respective governments therein proposed, desire to express their satisfaction with this manifestation of an intention on the part of the British plenipotentiaries, by the means referred to, to maintain the relations of good neighborhood between the British possessions in North America and the United States; and they will convey the communication of the British plenipotentiaries to the President of the United

States, with a recommendation that the same may be by him made known to the Senate for its information, together with the treaty, when the latter is submitted to that body for ratification.

"T. F. BAYARD.

"WILLIAM L. PUTNAM.

"JAMES B. ANGELL.

"WASHINGTON, *February 15, 1888.*"<sup>a</sup>

The treaty was communicated by the President to the Senate **Subsequent his-** February 20, 1888, with a message recommending **tory.** its approval.<sup>b</sup> May 7, 1888, a report was made from the Committee on Foreign Relations of the Senate adverse to ratification. A minority report also was presented.<sup>c</sup> The treaty was debated in open session. August 21, 1888, the resolution that the Senate give its advice and consent failed by a vote of 27 yeas to 30 nays.<sup>d</sup> August 23, 1888, President Cleveland sent to Congress a message in which he stated that, as the Senate had rejected the treaty without any apparent disposition to alter or amend it, and with indications of the opinion that no negotiation should then be conducted touching the matter at issue, he turned to the contemplation of a plan of retaliation as a mode which still remained of treating the situation. In connection with the question of the fisheries, he also dealt with the subject of discrimination in tolls and charges in the use of the Canadian canals by citizens of the United States, under Article XXVII. of the treaty of Washington. He recommended, as measures of retaliation, the suspension of the bonded

<sup>a</sup> For the form of the license subsequently issued by the Dominion Government under this *modus vivendi*, see For. Rel. 1888, I. 808.

Under the balt act of 1889 licenses also were issued by the Newfoundland government to foreign fishing vessels, including vessels of the Dominion of Canada. Licenses issued by the Dominion under the *modus vivendi* were not good in Newfoundland. (Mr. Blaine, Sec. of State, to Mr. Dawes, May 7, 1890, 177 MS. Dom. Let., 421.)

As to the proposed reciprocity convention between the United States and Newfoundland, known as the "Blaine-Bond convention," and the protest of Canada against it, see Canadian House of Commons papers containing the message of the governor-general of June 3, 1891, p. 85. At page 82 of the same document may be found a note of Mr. Blaine, Secretary of State, to Sir Julian Pauncefote, British minister, of April 1, 1891, referring to a negotiation to be held with representatives of Canada in Washington on the subject of commercial relations. The opening of the conference was finally fixed for Oct. 12, 1891.

<sup>b</sup> H. Ex. Doc. 434, 50 Cong. 1 sess. 9-13; S. Ex. Doc. 113, 50 Cong. 1 sess. 127-131.

<sup>c</sup> The majority report was signed by Messrs. Sherman, Edmunds, Frye, Evarts, and Dolph; the minority report by Messrs. Morgan, Saulsbury, Brown, and Payne. (S. Report 3, Conf. 50 Cong. 1 sess.) The reports were made public.

<sup>d</sup> Congressional Record, 50 Cong. 1 sess. 7768.

transit system, maintaining in this relation that Article XXIX. of the treaty of Washington was no longer in force, and the adoption of such legislation as should impose on Canadian vessels and cargoes navigating the canals of the United States the same rule of discrimination as was applied to United States vessels and cargoes on the Canadian canals.<sup>a</sup>

No action was taken by Congress in pursuance of these recommendations.

"The questions between Great Britain and the United States relating to the rights of American fishermen, under treaty and international comity, in the territorial waters of Canada and Newfoundland, I regret to say are not yet satisfactorily adjusted.

"These matters were fully treated in my message to the Senate of February 20, 1888, together with which a convention, concluded under my authority with Her Majesty's Government on the 15th of February last, for the removal of all causes of misunderstanding, was submitted by me for the approval of the Senate.

"This treaty having been rejected by the Senate, I transmitted a message to the Congress, on the 23d of August last, reviewing the transactions and submitting for consideration certain recommendations for legislation concerning the important questions involved.

"Afterwards, on the 12th of September, in response to a resolution of the Senate, I again communicated fully all the information in my possession as to the action of the government of Canada affecting the commercial relations between the Dominion and the United States, including the treatment of American fishing vessels in the ports and waters of British North America.

"These communications have all been published, and therefore opened to the knowledge of both Houses of Congress, although two were addressed to the Senate alone.

"Comment upon or repetition of their contents would be superfluous, and I am not aware that anything has since occurred which should be added to the facts therein stated. Therefore, I merely repeat, as applicable to the present time, the statement which will be found in my message to the Senate of September 12th last, 'that since March 3, 1887, no case has been reported to the Department of State wherein complaint has been made of unfriendly or unlawful treatment of American fishing vessels on the part of the Canadian authorities, in which reparation was not promptly and satisfactorily obtained by the United States consul-general at Halifax.'

"Having essayed, in the discharge of my duty, to procure by negotiation the settlement of a long-standing cause of dispute, and to remove a constant menace to the good relations of the two countries,

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<sup>a</sup> H. Ex. Doc. 434, 50 Cong. 1 sess.

and continuing to be of opinion that the treaty of February last, which failed to receive the approval of the Senate, did supply 'a satisfactory, practical, and final adjustment upon a basis honorable and just to both parties of the difficult and vexed question to which it related,' and having subsequently and unavailingly recommended other legislation to Congress which I hoped would suffice to meet the exigency created by the rejection of the treaty, I now again invoke the earnest and immediate attention of the Congress to the condition of this important question, as it now stands before them and the country, and for the settlement of which I am deeply solicitous."

President Cleveland, Annual Message, Dec. 3, 1888, For. Rel. 1888. I. pp. x-xi.

The messages referred to in the foregoing extract may be found in the following documents: Message of Feb. 20, 1888, H. Ex. Doc. 434, 50 Cong. 1 sess. pp. 9-13; S. Ex. Doc. 113, 50 Cong. 1 sess. 127-131; message of Aug. 23, 1888, H. Ex. Doc. 434, 50 Cong. 1 sess.; message of Sept. 12, 1888, S. Ex. Doc. 265, 50 Cong. 1 sess.

In connection with the discussions of 1886-1888, we may refer to the following prints:

The United States and the Northeastern Fisheries: A History of the Fishery Question. By Charles B. Elliott, LL. B., Minneapolis, 1887. 151 pp.

Isham, The Fishery Question: New York, 1887.

A paper read by the Hon William L. Putnam, of Portland, Maine, March 28, 1887, before the Fraternity, a social and literary club.

Diplomatic Fly-Sheets, Tuesday, March 15, 1887, containing a report by the St. Pancras foreign affairs committee on "The alleged 'Rights of American fishermen in British North-American waters.'"

A letter of William A. Day, counsel for the Grand Trunk Railway Company, of Canada, to the Hon. William Windom, Secretary of the Treasury, in the matter of consular sealing of goods for transportation through Canada. [No date.] This letter maintains the continuing force of Art. XXIX of the treaty of Washington.

The Fisheries Dispute. By John Jay, late minister to Vienna: New York, 1887. As may be seen at p. 9 of this pamphlet, the author of it argues upon the assumption, the grounds of which are not disclosed, that the convention of 1818 was "suspended," in the sense of being supplanted by the treaties of 1854 and 1871. As has been seen, these treaties merely granted for a term of years and for specific considerations certain privileges which were not secured by the convention of 1818.

For references to fisheries correspondence, see pp. 317-322 of Martin's General Index to the Dip. Cor. and For. Rel. of the United States.

"On the part of the government of the Dominion of Canada an effort has been apparent during the season just ended to administer the laws and regulations applicable to the fisheries with as little occasion for friction as was possible, and the temperate representations of this Government in respect of cases of undue hardship or of harsh interpretations have been in most cases met with measures of transitory relief. It is trusted that the attainment of our just



rights under existing treaties and in virtue of the concurrent legislation of the two contiguous countries will not be long deferred and that all existing causes of difference may be equitably adjusted."

President Harrison, annual message, Dec. 3, 1889.

See report of Select Committee of the Senate on Relations with Canada, July 21, 1890, S. Report 1530, 51 Cong. 1 sess.

As to the case of the *Howard Holbrook*, under the Newfoundland bait act of 1889, see Mr. Blaine, Sec. of State, to Mr. Lincoln, min. to England, March 30, 1891, MS. Inst. Gr. Br. XXIX. 439; also, as to the seizure of the *Rapid Transit*, under the same act, see Mr. Uhl, Act. Sec. of State, to Mr. White, Sept. 4, 1894, 198 MS. Dom. Let. 476. The act requires a license to be obtained for any exportation of herring to foreign parts, and requires the licensee to give bond for the landing of the cargo in the foreign country.

The *Frederick Gerring, jr.*, having been condemned for unlawful fishing in territorial waters, was afterwards restored on payment of a nominal fine, with costs, it being alleged in extenuation that the vessel caught a seine full of mackerel outside and drifted inside the line while removing the fish from the seine. Gratification with the decision was expressed by the Department of State. (Mr. Day, Act. Sec. of State, to Mr. Hay, min. to England, July 19, 1897, MS. Inst. Gr. Br. XXXII. 172.)

As to the fine imposed on the American schooner *Carrie E. Phillips* at Shelburne, see Mr. Day, Assist. Sec. of State, to Sec. of Treas. Feb. 9, 1898, 225 MS. Dom. Let. 335.

On the representation of the British ambassador that American fishing vessels were in the practice of resorting to Canadian waters and engaging in commercial transactions, without reporting their presence and business to the customs authorities, as required by the local laws and regulations, the Secretary of the Treasury was requested to communicate the complaint to the officials at Gloucester, Mass., and Eastport, Maine, whence the vessels complained of proceeded, with instructions to notify such vessels sailing from those ports "that the practice referred to will subject them to arrest and punishment by the Canadian authorities, and that in view of the negotiations now pending between the Governments for an amicable adjustment of fishing rights all causes of irritation should be avoided." (Mr. Hay, Sec. of State, to Sec. of Treas. Nov. 4, 1898, 232 MS. Dom. Let. 470.)

As to fishing in Dixon Entrance and Hecate Strait on the Pacific coast, see Mr. Adee, 2nd. Asst. Sec. of State, to Mr. Eatock, Oct. 28, 1897, 222 MS. Dom. Let. 59.

For an agreement between France and Great Britain in relation to the Newfoundland fisheries, see For. Rel. 1904, 329.

February 15, 1892, a tentative understanding was reached between Mr. Blaine, as Secretary of State, and the delegates of the government of the Dominion of Canada, for the appointment of a commission of two experts to consider and report upon (1) the prevention of destructive methods of fishing in the territorial and contiguous waters of the two countries, and in waters outside their territorial

limits; (2) the prevention of the polluting and obstruction of such contiguous waters to the detriment of fishing and navigation; (3) the closed seasons which should be observed in such waters; and (4) the restocking and replenishing of such waters with fish. A formal agreement to this effect was concluded by an exchange of notes.<sup>a</sup> Mr. Richard Rathbun, of the United States Fish Commission, was appointed commissioner on the part of the United States.<sup>b</sup> President Cleveland, in his annual message of December 3, 1894, stated that the preliminary investigations of the commission were in progress. The time for the conclusion of these investigations was afterwards extended.<sup>c</sup> The report of the commission was communicated to Congress February 24, 1897.<sup>d</sup>

The subject of the fisheries was embraced in the work of the joint high commission of 1898-99, whose labors were suspended in consequence of differences touching the Alaskan boundary.

#### V. WHALE FISHERIES.

#### § 169.

In May, 1799, a copy was sent to the minister of the United States in London of what purported to be a proclamation issued by Rear-Admiral Pringle, commanding at the Cape of Good Hope, forbidding all vessels, except British, to kill whales or seals on the coast of that colony within five leagues of land, and threatening, in case of disobedience to his orders, to seize them and send them to the Cape to be proceeded against according to law. It was stated that the American whaling ship *Joanna* had apparently been interfered with under the order, which the United States conceived to be "unlawful;" and the minister was instructed to lay the subject before Lord Grenville.

Mr. Pickering, Sec. of State, to Mr. King, min. to England, May 11, 1799.  
MS. Inst. to U. States Ministers, V. 127.

"I have the honor to acquaint you that complaints have been received from the Russian Government that in the month of Sep-

<sup>a</sup> Mr. Foster, Sec. of State, to Mr. Herbert, British chargé, Oct. 4, 1892, For. Rel. 1892, 317; Sir Julian Pauncefote, Brit. min., to Mr. Foster, Sec. of State, Dec. 5, 1892, For. Rel. 1892, 324; Mr. Foster, Sec. of State, to Sir Julian Pauncefote, Brit. min. Dec. 6, 1892, For. Rel. 1892, 326. See, as to the salmon fisheries in the Fraser River, For. Rel. 1894, 259.

<sup>b</sup> For. Rel. 1892, 327; Mr. Foster, Sec. of State, to Mr. Cogswell, M. C., Jan. 28, 1893, 190 MS. Dom. Let. 100.

<sup>c</sup> Mr. Gresham, Sec. of State, to Sir Julian Pauncefote, British ambass. Dec. 31, 1894, MS. Notes to Great Britain, XXII. 663.

<sup>d</sup> H. Doc. 315, 54 Cong. 2 sess. 178 pp. In connection with the subject of protecting the fisheries, see S. Mis. Doc. 28, 44 Cong. 2 sess.; S. Rep. 365, 48 Cong. 1 sess.

tember, 1858, two female Russian subjects were abducted from the village of Armansk, on the coast of the Province of Okhotsk, by the crew of an American vessel. It has, however, been impossible to identify the perpetrators, or even the vessel to which they belonged.

“That Government naturally feels seriously offended, especially as other charges of misconduct against American vessels in the same quarter had also been preferred. Unless such lawless proceedings can be checked, it is to be feared, that that Government will take measures of prevention which would be very injurious to our whaling interests in the North Pacific, by prohibiting the capture of whales within a marine league of Russian territory. Under these circumstances, the propriety of issuing instructions to the collectors of the several ports where whaling ships are cleared, to impress upon the captains of such vessels necessity of their being vigilant toward preventing any such unlawful acts on the part of their crew, is submitted for your consideration.”

Mr. Cass, Sec. of State, to Mr. Cobb, Sec. of Treasury, Nov. 21, 1860, 53 MS. Dom. Let. 270.

An instruction in similar terms, with a view to give warning to the masters of American whalers, was sent to the United States consul at Callao. (Mr. Trescott, Asslst. Sec. of State, to Mr. Trevitt, consul at Callao, Nov. 22, 1860, 30 MS. Despatches to Consuls, 13.)

In 1868 a correspondence took place between the United States and Russia, in consequence of the alleged interference of Russian officials with the operations of American whalers in the Sea of Okhotsk. The Russian Government, stating that “foreign whalers are forbidden by the laws in force to fish in the Russian gulfs and bays at a distance less than three miles from the shore, where the right of fishing is exclusively reserved to Russian subjects,” disclaimed any intention to interfere with whaling operations elsewhere.

Dip. Cor. 1868, I. 462, 465, 467, 469, 470-473.

As to whalling at the Falkland Islands, see correspondence with the British Government in 1854, *infra*, § 171.

## VI. SEAL FISHERIES.

### 1. COASTS OF SOUTH AMERICA.

#### § 170.

“I have had the honor to receive your letter of the 18th ult., in which you represent that American vessels have interfered in the fishery of sea dogs and other amphibious animals, upon points occupied by Spanish subjects on the coast of South America, such interference having in many instances been supported by force; and you therefore signify by order of His Catholic Majesty, that he has determined to prevent for the future a repetition of the infractions in question.

"The President of the United States, having been made acquainted with this representation, directs me to assure you that the United States are not inclined to countenance in any manner acts of their citizens in contravention of the rights of His Catholic Majesty nor to screen them from the lawful consequences resulting from such conduct, but, at the same time that he manifests this respect to the territorial sovereignty of Spain, he expects from the friendly relations of the two countries, that the rights of our citizens to navigate and use the seas, and to avail themselves of all the natural and common advantages incident to them, will be neither controverted nor interrupted."

Mr. Madison, Sec. of State, to the Marquis of Casa Yrujo, Span. min.  
June 1, 1803, 14 MS. Dom. Let. 158.

## 2. CASE OF THE FALKLAND ISLANDS.

### § 171.

"Having by the President, by and with the advice and consent of the Senate, been appointed chargé d'affaires to the Republic of Buenos Ayres, you will embark as speedily as possible for the place of your destination, in the United States sloop of war, the *Peacock*, now lying at Boston.

"On the ordinary duties you will have to perform as charged with the political interests of your Government, and the protection of your fellow-citizens in their lawful intercourse with the country to which you are sent, you need no particular instructions. Your general knowledge of the subject, the perusal of the instructions to your predecessors, and their correspondence with the Government, will be sufficient guides in that part of your duties.

"There are, however, subjects in the relations between the two countries on which it is necessary to put you more particularly in possession of the views of your Government—some of which subjects, for your negotiations, will require the exercise of that discretion, industry, and talent you are known to possess, and which led to your selection for the present mission.

"1. The first of these to which it is necessary to call your attention are the acts and pretensions of an individual at the Falkland Islands, pretending to or really possessing authority under the Government to which you are sent.

"A certain Lewis Vernet, who appears to have formed an establishment at Soledad, one of the Falkland Islands, has, within a few months past, captured three American vessels—the *Breakwater*, the *Harriet* of Stonington, and the *Superior* of New York—under pretense that they had infringed some unknown laws of the Republic of Buenos Ayres, for the protection of the fisheries. By the affidavit

of William Mitchel, copy of which is annexed, it appears that two of the vessels so captured have, without any form of trial, been appropriated to the use of Vernet, and fitted out with the avowed design of making them the instruments of further aggressions on the property of citizens of the United States pursuing their lawful commerce and business in those seas.

"A copy of Vernet's circular to the masters of vessels arriving at the Falkland Islands, with a copy of the decree, real or pretended, under which he professes to act, has also been forwarded to the Department, by a person in Philadelphia (L. Krumbhaar), supposed to be the partner, but certainly the correspondent of Vernet. His letter, with Vernet's circular, and copy of the decree, are also annexed for your information.

"The lawless and piratical nature of these acts, could not permit the President for a moment to believe that they were authorized by a friendly power. This persuasion was strengthened by the circumstances that, at the date of the alleged decree put forth by Vernet as his authority, we had an accredited agent of the Republic of Buenos Ayres, who was at the time in active correspondence with that Government, and with this Department, whose despatches bearing date within a few days after that of the pretended decree, are entirely silent on the subject.

"There are other reasons for doubting the authenticity of this paper. At the time it bears date, the Government was engaged in a perilous civil war, with an enemy in the immediate vicinity of the city, which was terminated only a few days after by a revolution changing their form of government, as well as their governors. The decree is in the name of a governor delegate, appointed during the absence of the regular chief, without the assistance of the council of government.

"At this time (the 10th June 1829) we were on the most friendly terms with the Government of Buenos Ayres. It was known there that, from the earliest period of our political existence, our citizens engaged in the fisheries had resorted to the Falkland Islands for shelter, for such necessities as it afforded, and for the purpose of carrying on their business on its shores, and in its harbors, and bays, and it is entirely inconsistent with this knowledge and those friendly dispositions, that powers should have been given to an individual, and that individual not a citizen of the country, to interrupt this trade at his pleasure, and even making it his interest so to do, at the same time that the decree was kept secret from the agent of our Government who was on the spot.

"With these reasons for believing the pretence of a decree a mere color for piratical acts, the President has directed the Secretary of the Navy to send all the force he could command to those seas, with

the orders of which a copy is annexed to these instructions; and also communicated the representations he had received, and the measures he had adopted in consequence of them, to Congress by message, copy of which is also annexed.

“This statement of facts puts you in possession of the position of this important affair, at this period.

“While the Executive takes measures for the immediate protection and relief of our fellow citizens, it will be your duty, first, to justify these measures to the Government of Buenos Ayres in case you should find on your arrival that the authority set up by Vernet has really been given to him, and is avowed by the Government, and afterwards to place our claim to the fisheries in a proper point of view, and secure it from future interruption, by a formal acknowledgment of our right, and by procuring proper stipulations guarantying its undisturbed exercise hereafter.

“The directions from the Navy Department, dated 29th November, 1831, are general—to afford protection to our citizens engaged in the fisheries, and in their lawful commerce, and particularly if they are molested in their usual pursuits and trade.’

“The orders given on the 4th January, are in answer to a request by the commander of the squadron for more particular instructions. The circumstances of the case are there stated, and the orders given in consequence of them are infinitely more moderate than those circumstances would have justified. The commander is to inquire whether the acts have been done under the allegation of authority from the Government, and in that case he is merely directed to prevent our ships from capture, to retake those that have fallen into the hands of Vernet, and keep them until the return of a despatch vessel he is ordered to send to you for instructions. The most friendly forbearance alone dictated these orders. The circumstances of the case would have justified immediate acts of hostility against the perpetrators of such outrageous acts, which we would have had good right to suppose unauthorized. But the more moderate and friendly course has been pursued. There was a possibility that Vernet might under false pretenses have obtained from the delegate governor the decree which he sets up as his authority, and being vested ostensibly with a national character, we thought it right before proceeding further to ask for a disavowal of the acts in which we must suppose he has exceeded his powers. You will not fail to cause the friendly spirit which dictated this course to be perceived, and duly appreciated, before you proceed to demand a disavowal of the acts of Vernet, and restoration, with indemnity, of the property he has seized. This you are to do on the following grounds:

“First. That without entering here into the question of right, which will be hereafter discussed, the seizure of our vessels can not

be justified under the decree from which Vernet pretends to derive his authority, because, at the period he was so appointed, we were in actual use of the shores, bays, and harbors of those islands for the purposes of shelter and fishery. We had been in such use for more than fifty years, undisturbed when there were settlements on the island, unmolested when there were none. We had in consequence of this undisturbed use increased our capital employed in the fisheries, and had good reason to believe that, whatever right any nation might have to interfere with a use so extensively important to us, and so long enjoyed, that we should specially be informed of such conflicting claim, more especially if the claim were set up by a friendly nation with whom we were then connected in the usual diplomatic intercourse, and who, not being ignorant that we had made this use of the shores they claimed, had suffered us uninterruptedly, and without asking any permission, to enjoy it as a common right. To give the first notice of such interfering claim by a seizure and confiscation of our vessels unsuspectingly engaged in what they deemed a lawful occupation, partakes more of a hostile act than of the assertion of a right as used among civilized nations.

“Still stronger would be the reasoning if the act is considered not as one emanating from the immediate authority of the nation for the assertion of a public right claimed by them, but as the delegation of an authority to an individual to exercise that national right at his own discretion, and for his own benefit, in the manner claimed by the person who has, as we think, abused the authority, if any, and whatever it may be, that has been vested in him.

“The decree in question, supposing it to be authentic, is dated the 10th of June, 1829. Mr. Forbes, our chargé d'affaires, was then in Buenos Ayres. Had the decree been communicated to him, had he been told that the islands could no longer be made use of in the accustomed manner, under the penalty of confiscation of the vessels resorting there, he would have communicated the information to his Government, and measures would have been taken to inquire into the right, and, if it were acknowledged, to warn our citizens that it ought to be respected. Nothing of this kind was done, and our ships are seized and confiscated for the violation of a right (supposing it to be one) of which our Government had no notice, and our citizens no warning.

“Should it be said, in answer to this branch of the argument, that the decree in question was published in the gazette of the day, at Buenos Ayres, (which is not however believed, as Mr. Forbes, very minute in his general correspondence, takes no notice of it,) and should this prove to be the fact, the reply is easy: First, the communication ought to have been special. It interfered with an existing and most extensive use, and therefore not only a friendly disposi-

tion, but absolute justice, required that express notice should be given of an intent to interfere with this use. Secondly, the communication of the decree, supposing the publication a sufficient notice, would not inform us of the interpretation that was practically to be put upon it. The preamble asserts a possession by Spain on the 10th May 1810 of the Falkland Islands, and of all the others near Cap-Horn, including that of Terra del Fuego, and derives the right in the Republic to them, as forming part of the vice royalty of the Rio de la Plata by the effect of the revolution. It then erects those islands into a military and civil government, directs that the residence of the governor shall be on the island of Soledad, on which a battery is to be erected under the flag of the Republic, and directs him (the governor) to enforce the laws of the Republic on the inhabitants, 'and to see to the execution of the regulations of the fishery on all the coasts of the same.' What those regulations are, is not even hinted at. Did they apply to the inhabitants only? Such would be the natural construction. Did they exclude foreigners from the right of fishery? If so, some notice, some motive for inquiry, ought to have been given. The law of nations, founded in the principles of justice, requires that a right enjoyed for more than a half a century, even if only by tacit permission, be not withdrawn without notice; much less ought any penalty to be enforced for the exercise of it before such notice. Thus, even supposing the right of the Buenos Ayrean Government to be uncontroverted, we have a just cause to complain of the seizure of our vessels, and to demand restoration and indemnity. But our cause of complaint is rendered more apparent from the manner in which their officer, supposing him to be such, has executed their pretended right of seizure and confiscation, without trial. Without evidence he has imprisoned the crew, and converted the vessels and cargoes to his own use. He has done this after enticing them into his port by the offer of supplies and assistance, and as far as appears without any allegation of a breach of their fishery laws. To what extent those laws go, what fisheries they forbid, and in what seas or on what coasts, are all objects of serious inquiry, and must form an immediate object of your research.

"Without any precise information on that subject, your instructions must be hypothetical; to remonstrate against them should they be found to contravene rights which we think ourselves entitled to by the law of nations. These will be briefly explained as applicable to the subject, and to the circumstances of the two nations.

"The right of fishery, considered as to the place in which it is to be exercised, is that which is carried on solely on the high seas out of the jurisdiction of any nation; that which is carried on on the high seas, but within the distance of the shore belonging to another nation,



which gives to it a customary jurisdiction; within bays of the sea included by an ideal line drawn from one headland to another—none of which require the use of the shores for the drying or preparing of the animals taken from the sea; and, finally, those fisheries which require the use of the shore for some of the operations necessary for the fishery, either to haul the seines, or to prepare or dry the fish.

“The ocean fishery is a natural right which all nations may enjoy in common. Every interference with it by a foreign power is a national wrong. When it is carried on within the marine league of the coast, which has been designated as the extent of national jurisdiction, reason seems to dictate a restriction. If, under pretext of carrying on the fishery, an evasion of the revenue laws of the country may reasonably be apprehended, or any other serious injury to the sovereign of the coast, he has a right to prohibit it, but as such prohibition derogates from a natural right, the evil to be apprehended ought to be a real, not an imaginary one. No such evil can be apprehended on a desert and uninhabited coast; therefore such coasts form no exception to the common right of fishery in the seas adjoining them. All the reasoning on the subject of the ocean applies to the large bays the entrances to which can not be defended.

“As to the use of the shores for purposes necessary to the fishery, that depends on other principles. When the right of exclusive dominion is undisputed, the sovereign may, with propriety, forbid the use of them to any foreign nation; provided such use interferes with any that his subjects may make of them; but when the shore is unsettled and deserted, and the use of it, of course, interferes with no right of the subjects of the power to which it belongs, then it would be an infringement of the right to the common use of the shores as well as of the ocean itself, which all nations enjoy by the laws of nature, and which is restricted only by the paramount right which the sovereign of the soil has to its exclusive use, when the convenience or interest of his subjects require it, or when he wishes to apply it to public purposes. It is true that he is the judge of this interest of his subjects, and of the necessity of using it for his public purposes, but justice requires that, where no such pretension can be made, the shores as well as the body of the ocean ought to be left common to all.

“These principles seem to have dictated the articles in the treaties between the United States and England. The third article of the treaty of peace of 1782, declares that the people of the United States shall *continue* to enjoy, unmolested, the right to take fish on the Grand Bank, &c., and to dry and cure their fish in any of the *unsettled bays*, harbors and creeks of Nova Scotia, Magdalen Islands, and Labrador, *so long as the same shall remain unsettled*, but that when settlements are made, they cannot enjoy the right without a

previous agreement with the inhabitants or possessors of the soil. In the treaty of Utrecht, too, France is allowed the use of the unsettled shores, for the purpose of drying fish; by certain metes and bounds. But the most remarkable treaty on this subject is that entered into between Great Britain and Spain in 1790, by which the latter power stipulates not to make any settlements on either the Pacific or the Atlantic shores of America further south than those which were then made. A copy of this treaty, taken from a book printed in Spain, in the year 1801, by authority, entitled '*Coleccion de los tratados*,' &c., is herewith delivered to you. This stipulation is clearly founded on the right to use the unsettled shores for the purpose of fishery, &c. and to insure its continuance.

"But where the unsettled shore, although under the nominal sovereignty of one nation, is in fact possessed by independent uncivilized tribes, the right to exclude other nations from the use of the shores stands on a much less stable footing. This is the case with all the continent of South America, to its extremity, from the Rio Negro, or Rio Santos, in latitude 41°, and also with the adjacent islands of Terra del Fuego and Staten land. On the Pacific side, the Arancaunians, and on the Atlantic the Puelches, Patagonians, and other tribes, are perfectly independent. To the common use of these shores, therefore, there can be no reasonable objection.

"How far the present Government of Buenos Ayres is entitled to the extent of territory necessary to establish a right over these fisheries, even supposing them to be attached to the sovereignty of the country, is another important question to which your attention must be turned, and which we have not the means of determining here. The vice royalty of Buenos Ayres under the Spanish Government comprehended several provinces on both sides of the La Plata; these now form separate governments as far as their unsettled state will allow us to judge of their condition. But that Patagonia was ever included in the Province of Buenos Ayres proper, is not believed. A project was formed by the Spaniards in 1778 of forming settlements there, but although the settlers came out to Monte Video, the project was abandoned, and the whole of the continent, and islands of Terra del Fuego and Staten land remain as unsettled and desert now as they were found at the time of their discovery.

"From the foregoing facts, and principles applicable to them, you are instructed to press, in the negotiation you are authorized to open on the occasion:

"1. The perfect right of the United States to the free use of the fishery—on the ocean, in every part of it, and on the bays, arms of the sea, gulfs, and other inlets, which are incapable of being fortified.

"2. To the same perfect right on the ocean within a marine league of the shore, when the approach cannot be injurious to the sovereign

of the country, as it can not be on the shores which are possessed by savage tribes, or are totally deserted, as they are to the south of the Rio Negro.

“3. To the same use of the shores when in the situation above described.

“4. That, even where a settlement is made and other circumstances would deprive us of the right, a constant and uninterrupted use will give it to us.

“It can not be denied that the United States, since the beginning of their independent political existence, and even while they were colonies, were, in common with other nations, in the undisturbed enjoyment of the whale and seal fishery, with the knowledge of Spain—and this, it is believed, applies particularly to the Falkland Islands—and at times when there were settlements on them as well as when they were deserted.

“The object of establishing these points is to embody them into a treaty which you have herewith a full power to negotiate and conclude. The articles on this subject must acknowledge our right to the fisheries on the shores while they remain unsettled, and you may fix a certain extent from each settlement, not to exceed ten leagues each way.

“With respect to the vessels seized by Vernet, if his acts are avowed, you are to justify their recapture (if they have been taken by our squadron), and demand their restitution if they have not, on the grounds hereinbefore stated to show the irregularity of his proceedings; and if his acts are disavowed, you are to give orders to the commander of the squadron to break up the settlement and bring him to Buenos Ayres for trial.

“You will, in your demands on the subject of the fisheries, use firm but not irritating language. The President is fully sensible of the difficult situations in which the internal troubles of the Republic have placed its Government, and he does not attribute to an unfriendly disposition acts that, in ordinary times, might wear such an aspect; but he expects, from the similarity of our republican forms, and from a recollection of our early recognition of their independence, and our uniformly amicable disposition since, that, on consideration of our complaints, full justice will be done to our citizens, and that measures will be taken to meet the disposition he feels for a strict commercial union on principles of perfect reciprocity.”

Mr. Livingston, Sec. of State, to Mr. Baylles, chargé d'affaires to Buenos Ayres, Jan. 26, 1832, MS. Inst. Am. States, XIV. 235.

See Mr. Livingston, Sec. of State, to Mr. Phelps, Dec. 25, 1832, 25 MS. Dom. Let. 222.

A claim for salvage was made by Gilbert R. Davison, second sailing-master of the *Lexington*, for personal services bestowed on some of the seal

skins which were taken by Vernet on the *Harriet* and which were recovered by Capt. Duncan. The court denied the claim, holding that an officer had no right, without the express orders of his government, to enter the jurisdiction of a country at peace with the United States and forcibly seize upon property found there and claimed by citizens of the United States, and that, as it was proved that Vernet was acting under a commission from Buenos Ayres, the seizure of the skins in question by Captain Duncan was unlawful. (*Thompson, J. Davison v. Seal-skins*, 2 Palme, 324.) See, however, *Williams v. Suffolk Ins. Co.*, 13 Pet. 415.

"Dispatches have this day been received from Mr. Slacum, our consul at Buenos Ayres, by which it appears that one of the vessels captured by Vernet, the *Harriet*, has arrived as a prize at that place. She was claimed by Mr. Slacum, with damages, but under pretence that the facts had not been examined into she was detained at the date of his last letter, the 9th of December.

"About the time of the arrival of the schooner, the United States sloop of war *Lexington*, Captain Duncan, put into Buenos Ayres, and after waiting some days for the answer of that Government, sailed, as we understand by advice from Montevideo, to the Falklands, with the purpose (avowed to the Government of Buenos Ayres) of protecting our commerce, and disarming the band whom Vernet had left with orders to seize all Americans who might be found there.

"Should this purpose be executed, you are to justify it not only on the general grounds in your instructions, but on the further facts disclosed in the protest of the captain of the *Harriet*, which show the lawless, and indeed piratical proceedings of Vernet and his band—imprisoning the crews; leaving part of them on desert islands; sending others to distant foreign ports; refusing them the liberty to come with their vessel to the port where he sends her for condemnation; forcing others into his service; encouraging desertion from our vessels; robbing those which he seized of their cargoes, and selling them for his own use, without any form of trial or show of authority from the Government of Buenos Ayres for such acts; and finally, robbing shipwrecked mariners of the United States, and forcing them by threats into his service. These facts, which are clearly stated in the protests, and the further characteristic of his settlement, that it is composed of deserters from our ships, and renegades from all nations, governed by no laws but the will of Vernet, show clearly that it is an establishment dangerous to our commerce, which it is necessary in self-defence that we should break up, whether the Government of Buenos Ayres have a title to the jurisdiction of the islands, or have not. If they have the jurisdiction, they have no right so to use it as in any way to interfere with our right of fishery, established by long usage; but above all to use it in the irregular manner stated in the

affidavits, which they do not repress; and whether the omission proceeds from the want of means, or of inclination, the obligation of our Government to protect its own citizens, in either alternative, is equally imperative.

"You are particularly further instructed to use all your endeavors to prevent this incident from becoming an obstacle to the formation of a commercial treaty, and, if no other expedient offers, you may insert an article declaring that, not being able to agree, the subject is referred for future negotiation, but, in the meantime, we shall enjoy the right to the fisheries, as now practiced. This, however, is not to be resorted to unless it is found impossible to procure a treaty on any other terms.

"The additional information just received renders your presence at the place of your destination more necessary. And the President therefore directs me to say that, the vessel for your conveyance being ready, he expects that you will embark without delay."

Mr. Livingston, Sec. of State, to Mr. Bayles, chargé d'affaires to Buenos Ayres, Feb. 14, 1832, MS. Inst. Am. States, XIV. 247.

"I have to inform you that a demand of indemnification for the seizure of those vessels [the *Breakwater* and *Harriet*] has been pending for some time past, and that no opportunity for bringing it to a satisfactory close shall be omitted by this Department." (Mr. Webster, Sec. of State, to Mr. Hayward, Pres. Suffolk Ins. Co., Nov. 24, 1842, 32 MS. Dom. Let. 473.)

See, as to the release of the vessels and crews by Captain Duncan, and the dispersion of Vernet's colonists, *supra*, § 89, pp. 298-299.

The first reference in the public documents of the United States to the case of the Falkland Islands may be found in President Jackson's annual message of Dec. 6, 1831. In this message President Jackson stated that the name of the Republic of Buenos Ayres had "been used to cover with a show of authority acts injurious to our commerce and to the property and liberty of our fellow-citizens;" that an American vessel engaged in the pursuit of a trade "which we have always enjoyed without molestation, has been captured by a band acting, as they pretend, under the authority of the Government of Buenos Ayres;" that he had sent an armed vessel to those seas and should send a minister to inquire into the matter, as well as into the claim, if any, that was set up by Buenos Ayres to the islands. Meanwhile, he submitted the matter to the consideration of Congress, in order that he might be clothed with such means as might be deemed necessary "for providing a force adequate to the complete protection of our fellow-citizens fishing and trading in those seas." (Richardson, Messages and Papers of the Presidents, II. 553.)

When this message was sent to Congress, an important discussion was in progress at Buenos Ayres. With regard to this discussion and to subsequent events, the following facts may be stated:

June 10, 1829, the Government of Buenos Ayres issued a decree, claiming as successor of Spain the Malvinas (Falkland) Islands, and announcing that a political and military governor would be appointed to reside there and enforce the laws of the Republic, including the

regulations respecting the seal fishery. (20 Br. & For. State Papers, 314.)

November 26, 1831, Mr. Slacum, United States consul at Buenos Ayres, protested against the seizure of the American sealing schooners *Harriet*, *Superior*, and *Breakwater* at the islands, by Mr. Luis Vernet, the governor. December 3, 1831, Mr. Anchorena, minister of foreign affairs, replied, justifying the seizure as being in accordance with law. (20 Br. & For. State Papers, 314-316.)

On the same day Mr. Slacum communicated to Mr. Anchorena a letter from Captain Duncan, U. S. S. *Lexington*, of December 1, 1831, announcing that he intended to proceed to the islands for the protection of American citizens engaged in the fisheries. Captain Duncan referred to the seizure of American vessels and stated that seven Americans had been abandoned on one of the islands without the means of subsistence. He adverted to the fact that the captures were made under the assumed authority of the Government of Buenos Ayres. Mr. Anchorena referred the letter to the minister of war. The Government of Buenos Ayres suggested that Captain Duncan delay his departure pending efforts to arrange the matter; but Mr. Slacum, December 6, 1831, stated that his protest was made by authority of his Government, and that he could not consent to its rejection or withdrawal. (Id. 317.)

In a letter to Mr. Anchorena, of Dec. 7, 1831, Captain Duncan alleged that Vernet had plundered the *Harriet* of almost every article on board, and requested that he be delivered up to the United States on charges of piracy and robbery, or that he be arrested and punished by Buenos Ayres. (Id. 319.)

On the 9th of December Mr. Anchorena requested Mr. Slacum to notify Captain Davison, of the *Harriet*, in view of the pendency of legal proceedings against the schooner, not to leave the province without authorizing some one to act for him in the matter. On the same day Mr. Anchorena also replied to Mr. Slacum's note of December 6, protesting against the latter's course, and declaring that if Captain Duncan carried out his purpose of setting at naught the rights of the Republic the Government would address a formal complaint to the United States, in the belief that the United States would not despoil the Government of its possession of the islands. (20 Br. & For. State Papers, 320-322.) In acknowledging, on the 15th of December, Mr. Anchorena's two notes of the 9th, Mr. Slacum stated that Captain Duncan had weighed anchor several hours before their receipt; that the late chargé d'affaires of the United States had been instructed to remonstrate against any measures of the Government of Buenos Ayres which might be "calculated in the remotest degree to impose any restraints whatever upon the enterprise of the citizens of the United States engaged in the fisheries in question, or to impair their undoubted right to the freest use of them;" and that such a remonstrance was not made, probably because the instructions reached the chargé d'affaires only just before his death. (20 Br. & For. State Papers, 322-326.)

February 14, 1832, Mr. Garcia, who had succeeded Mr. Anchorena as minister of foreign affairs, notified Mr. Slacum that, in view of the "aberration of ideas" and "irregularity of language" in his notes, the Government had decided to suspend official intercourse with him and so to notify the United States; and on the same day the Govern-

ment issued a proclamation stating that the commander of the *Lexington* had invaded the islands, destroying public property, and assaulted the colonists, some of whom had been driven or torn from their homes or deluded by deceitful artifices, and been brought away and cast upon the shores of Uruguay. It was declared that an appeal would be made to the Government at Washington. (Id. 326.)

February 15, 1832, Mr. Slacum enclosed to the Government of Buenos Ayres a letter from Captain Duncan, dated off Montevideo, February 11, 1832, stating that he would deliver up or liberate the prisoners then on board the *Lexington* on an assurance from the Government that they had acted by its authority. Mr. Garcia immediately replied that Vernet was appointed military and political governor under the decree of June 10, 1829, and that he and those serving under him consequently could be answerable only to their own authorities. (20 Br. & For. State Papers, 328.)

June 20, 1832, Mr. Baylies, the new United States chargé d'affaires, having reached his post, addressed a note to Mr. Maza, then minister of foreign affairs, with reference to the seizure of the *Harriet Superior*, and *Breakwater*, and the imprisonment of their crews, and to the imprisonment of the crew of the American schooner *Belville*, wrecked on the coast of Tierra del Fuego. He complained that Vernet had seized a large number of seal skins and a quantity of whalebone, and obliged the American crews by threats to sign certain agreements; that Vernet had discriminated against American vessels, since he had not interfered with a British sealer, declaring that he could not take an English vessel with the same propriety as he could an American. Mr. Baylies further stated that he was instructed to say that the United States utterly denied the existence of any right on the part of Buenos Ayres to interfere with vessels or citizens of the United States "engaged in taking seals, or whales, or any species of fish or marine animals in any of the waters or on any shore or lands of any or either of the Falkland Islands, Tierra del Fuego, Cape Horn, or any of the adjacent islands in the Atlantic Ocean." He demanded full indemnity for what had been done. In support of this demand he addressed to the minister of foreign affairs, July 10, 1832, a long note, in which he examined the Argentine title to the islands, as well as the question of the fisheries, in the sense of his instructions. (20 Br. & For. State Papers, 330-336, 338-344, 345-346, 350-352.)

August 8, 1832, Mr. Maza communicated to Mr. Baylies a long report from Vernet, defending his conduct as well as the Argentine title to the islands. The Argentine Government refused to give reparation for Vernet's acts, but on the contrary demanded reparation for the acts of Captain Duncan, and suggested the mediation or arbitration of a third power. Mr. Baylies, however, demanded his passports, which, after much insistence on his part, were at length sent to him. (20 Br. & For. State Papers, 358, 364-436.)

January 24, 1833, the Government of Buenos Ayres sent to its House of Representatives a message relating to the occupation of the Falkland Islands by Great Britain. The act of taking possession was performed by Captain Onslow, of the British ship of war *Clio*, January 3, 1833. (20 Br. & For. State Papers, 1194-1199.)

June 17, 1833, Mr. Moreno, minister of Buenos Ayres at London, addressed to Lord Palmerston a long protest, giving a full exposition of

the Argentine claim of title. Lord Palmerston's answer was made January 8, 1834. It maintained that Great Britain had unequivocally asserted her sovereignty in the discussions with Spain in 1770 and 1771, which ended in Spain's restoring the islands. (22 Br. & For. State Papers, 1306-1304.)

"The right of the Argentine Government to jurisdiction over it [the territory of the Falkland Islands], being contested by another power [Great Britain], and upon grounds of claim long antecedent to the acts of Captain Duncan which General Alvear details, it is conceived that the United States ought not, until the controversy upon the subject between those two Governments shall be settled, to give a final answer to General Alvear's note, involving, as that answer must, under existing circumstances, a departure from that which has hitherto been considered as the cardinal policy of this Government."

Mr. Webster, Sec. of State, to General Alvear, Dec. 4, 1841, quoted by Mr. Bayard, Sec. of State, to Mr. Quesada, Mar. 18, 1886, MS. Notes to Arg. Rep. VI. 257.

In May, 1853, the British Government gave notice to the United States of an intention to send a force to the Falkland Islands, for the purpose of preventing the killing of wild cattle as well as other depredations there by persons landing from vessels of the United States; and a warning was issued by the Department of State to the masters of vessels and other citizens of the United States resorting to that quarter. In February, 1854, the American whaling ship *Hudson* and her tender, the schooner *Washington*, while lying at New Island, one of the Falkland group, were arrested on a charge of taking some pigs from one of the islands and were taken to Port Stanley, where they were restored, but not till it was too late to complete the season's voyage. Complaint was made to the British Government of this proceeding as unjustified by the circumstances, it being alleged that the crews of the vessels had killed only a few wild pigs, the progeny of hogs left by them on an uninhabited island for the purpose of breeding and furnishing food in future voyages. In a note to the British minister at Washington of July 1, 1854, Mr. Marcy, who was then Secretary of State, remarked that the warning issued by the Department of State "said nothing about the sovereignty" of the islands, and that "while it claimed no rights for the United States, it conceded none to Great Britain or any other power;" but that, "should the fact, however, be admitted that these islands were British territory," the treatment of the American ships must be considered as exceedingly hard. Mr. Marcy added: "A still graver matter of complaint is the pretension set up by these authorities to exclude our citizens from fishing and taking whale in the waters about these



islands. This right they have long enjoyed without its being questioned."

The British Government disavowed the action of its authorities in taking the vessels to Port Stanley, but on the other hand complained of the conduct of the commander of the U. S. S. *Germantown*, who was present in the islands when the incident occurred. With regard to the question of jurisdiction, Lord Clarendon expressed surprise that Mr. Marcy "should appear to call in question the right of Great Britain to the sovereignty of the Falkland Islands," and added: "Her Majesty's Government will not discuss that right with another power, but will continue to exercise, in and around the islands of the Falkland group, the right inherent under the law of nations in the territorial sovereign, and will hold themselves entitled, if they think fit, to prevent foreigners, to whatever nation belonging, from fishing for whale and seal within three marine miles of the coast, or from landing on any part of the shores of the Falkland Islands for the purpose of fishing or killing seals. Furthermore, and to prevent all possibility of mistake, Her Majesty's Government declare that they will not allow the wild cattle on the Falkland Islands to be destroyed, or other depredations to be committed on the islands by any foreigners, to whatever nation they may belong, and that all persons committing any such spoliations on the islands will be proceeded against under the enactments of the colonial laws."

Mr. Marcy, Sec. of State, to Mr. Crampton, British min., July 1, 1854, and Lord Clarendon, foreign sec., to Mr. Crampton, Sept. 21, 1854, S. Ex. Doc. 19, 42 Cong. 2 sess. 4-7.

In an instruction to Mr. Buchanan, then minister to England, of September 27, 1854, Mr. Marcy directed that a claim for indemnity be presented to the British Government. It appears, however, that the claim was not presented, owing to the receipt by Mr. Buchanan of a letter from Mr. Marcy, of Oct. 8, 1854, which was unofficial and does not appear on the records of the Department of State. This letter was written by Mr. Marcy in consequence of the receipt by him of Lord Clarendon's dispatch to Mr. Crampton of Sept. 21, 1854, after the sending to Mr. Buchanan of the instructions of the 27th of that month. (S. Ex. Doc. 19, 42 Cong. 2 sess. 12.)

"This Government is not a party to the controversy between the Argentine Republic and Great Britain; and it is for this reason that it has delayed, with the tacit consent of the former, a final answer to its demands. For it is conceived that the question of the liability of the United States to the Argentine Republic for the acts of Captain Duncan, in 1831, is so closely related to the question of sovereignty over the Falkland Islands, that the decision of the former would inevitably be interpreted as an expression of opinion on the merits of the latter. Such an expression it is the desire of this Government to avoid, so far as an adequate reference to the points of

argument presented in the notes recently addressed to this Department on behalf of your Government will permit. . . .

"As the resumption of actual occupation of the Falkland Islands by Great Britain in 1833 took place under a claim of title which had been previously asserted and maintained by that Government, it is not seen that the Monroe doctrine, which has been invoked on the part of the Argentine Republic, has any application to the case. By the terms in which that principle of international conduct was announced, it was expressly excluded from retroactive operation.

"If the circumstances had been different, and the acts of the British Government had been in violation of that doctrine, this Government could never regard its failure to assert it as creating any liability to another power for injuries it may have sustained in consequence of the omission. . . .

"But it is believed that, even if it could be shown that the Argentine Republic possesses the rightful title to the sovereignty of the Falkland Islands, there would not be wanting ample grounds upon which the conduct of Captain Duncan in 1831 could be defended. . . .

"On the whole, it is not seen that the United States committed any invasion of the just rights of the Government of Buenos Ayres in putting an end in 1831 to Vernet's lawless aggressions upon the persons and property of our citizens."

Mr. Bayard, Sec. of State, to Mr. Quesada, Mar. 18, 1886, MS. Notes to Arg. Rep. VI. 257.

### 3. BERING SEA.

#### § 172.

By an imperial ukase of July 8, 1799, the Emperor Paul I. of Russia granted to the Russian-American Company its first charter, which secured to the company various rights as to hunting and trading "in the northeastern seas and along the coasts of America."<sup>a</sup>

By a ukase of the Emperor Alexander, of September 7, 1821, giving his sanction to certain regulations of the Russian-American Company, "the pursuits of commerce, whaling, and fishing, and of all other industry, on all islands, ports and gulfs, including the whole of the northwest coast of America, beginning from Bering's Strait to the 51° of northern latitude, also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands, from Bering's Strait to the south cape of the island of Urup, viz, to 45° 50' northern latitude," were "exclu-

<sup>a</sup> For a fuller history of the subject, see Moore, *International Arbitrations*, I. chap. xvii. 755 et seq.

sively granted to Russian subjects," and all foreign vessels were forbidden, except in case of distress, "not only to land on the coasts and islands belonging to Russia, as stated above, but also to approach them within less than a hundred Italian miles."

A copy of the ukase was communicated by M. Poletica, Russian minister at Washington, to Mr. John Quincy Adams, then Secretary of State, on January 30/February 11, 1822. Mr. Adams replied on the 25th of February. He protested against the Russian claim of territory to a point so far south as the fifty-first degree of north latitude, and declared that the claim to exclude American vessels from the shore, "beyond the ordinary distance to which the territorial jurisdiction extends," had "excited still greater surprise." He therefore inquired as to the grounds of the Russian Government's action.

M. Poletica replied on the 28th of February, stating that the prohibition of foreign vessels from approaching the coast within a distance of a hundred Italian miles was a measure intended to prevent illicit trade and the supplying of the natives with arms and ammunition, and in conclusion he suggested that the possession by Russia of the territory both on the American and the Asiatic coast from Bering Strait downwards might have justified a claim of *shut seas*, but that the Russian Government had "preferred only asserting its essential rights, without taking any advantage of localities."<sup>a</sup>

With regard to the suggestion of *mare clausum*, Mr. Adams, in a note of March 30, 1822, observed that it might "suffice to say that the distance from shore to shore on this sea in latitude 51° north is not less than ninety degrees of longitude, or 4,000 miles;" and with regard to the prohibition of approach to the coasts he declared that the President was "persuaded that the citizens of this Union will remain unmolested in the prosecution of their lawful commerce, and that no effect will be given to an interdiction manifestly incompatible with their rights."<sup>b</sup>

Great Britain, as well as the United States, protested against the ukase of 1821, and as the result of their protests a negotiation was entered upon at St. Petersburg, which resulted, April 17, 1824, in the conclusion of a convention between the United States and Russia, whereby (Art. I.) it was agreed "that, in any part of the Great Ocean, commonly called the Pacific Ocean, or South Sea, the respective citizens or subjects of the high contracting parties shall be neither disturbed nor restrained, either in navigation or in fishing, or in the

<sup>a</sup>As to the ukase of 1821, see *Traité de Droit International*, by F. de Martens, professor at the University of St. Petersburg (Paris ed. 1883), I. 500.

<sup>b</sup>See, in this relation, *Memoirs of J. Q. Adams*, VI. 169.

power of resorting to the coasts, upon points which may not already have been occupied, for the purpose of trading with the natives, saving always the restrictions and conditions determined by the following articles." These "restrictions and conditions," as defined in Articles II. and III., were (1) that, "with a view of preventing the rights of navigation and of fishing exercised upon the Great Ocean by the citizens and subjects of the high contracting powers from becoming the pretext for an illicit trade," the citizens of the United States should not resort to any point where there was a Russian establishment without the permission of the governor or commander, nor subjects of Russia, without permission, to any establishment of the United States upon the northwest coast; and (2) that there should not be formed by the citizens of the United States, or under the authority of the United States, "any establishment upon the northwest coast of America, nor in any of the islands adjacent, to the north of fifty-four degrees and forty minutes of north latitude," nor by Russian subjects, or under the authority of Russia, any establishment south of that line. The subject of commercial intercourse was adjusted, temporarily, by Articles IV. and V. of the convention. By these articles it was provided that, for a term of ten years from the date of the signature of the convention, the ships of both powers might "reciprocally frequent, without any hindrance whatever, the interior seas, gulfs, harbors, and creeks," on the northwest coast of America for the purpose of fishing and trading with the natives; but, from the commerce thus permitted, it was provided that all spirituous liquors, firearms, other arms, powder, and munitions of war of every kind should always be excepted, each of the contracting parties, however, reserving to itself the right to enforce this restriction upon its own citizens or subjects. When the commercial privilege thus secured came to an end the Russian Government refused to renew it, alleging that it had been abused.<sup>a</sup> But under the most-favored-nation clause, contained in Article XI. of the treaty of commerce and navigation between the United States and Russia of December 18, 1832, citizens of the United States enjoyed on the Russian coasts the same privileges of commerce as were secured by treaty to British subjects.

A convention between Great Britain and Russia for the settlement of the questions between those powers, growing out of the ukase of 1821, was concluded at St. Petersburg on February 28/16, 1825. In regard to the rights of navigation, fishing, and of landing on the coasts, its provisions were substantially the same as those of the con-

<sup>a</sup> As to the construction of the convention, see Mr. Forsyth, Sec. of State, to Mr. Dallas, min. to Russia, May 4 and Nov. 3, 1837, MS. Inst. Russia, XIV. 39, 41.

vention between Russia and the United States. It also secured for the space of ten years the enjoyment of substantially the same reciprocal privileges of commerce. These privileges were renewed by Article XII. of the treaty between Great Britain and Russia of January 11, 1843.

By a convention signed at Washington on the 30th of March, 1867, the Emperor of Russia, in consideration of the sum of \$7,200,000 in gold, ceded "all the territory and dominion" which he possessed "on the continent of America and in the adjacent islands," to the United States. Of this cession the eastern limit, as described in Article I. of the convention, is the line of demarcation between the Russian and British possessions as established by the Anglo-Russian convention of February 28/16, 1825. The western limit is defined by a water line, beginning in Berings Straits, and proceeding north and south as follows: Beginning at a point in those straits, on the parallel of 65° 30' north latitude, at its intersection by the meridian which passes midway between the islands of Krusenstern or Ingaloock, and the island of Ratmanoff or Noonarbook, it "proceeds due north without limitation" into the "Frozen Ocean." Such is the northward course. In its southward course it begins at the same initial point, and "proceeds thence in a course nearly southwest, through Bering's Straits and Bering's Sea, so as to pass midway between the northwest point of the island of St. Lawrence and the southeast point of Cape Choukotski, to the meridian of one hundred and seventy-two west longitude; thence from the intersection of that meridian in a southwesterly direction, so as to pass midway between the island of Attou and the Copper Island of the Kormandorski couplet or group in the North Pacific Ocean, to the meridian of one hundred and ninety-three degrees west longitude, so as to include in the territory conveyed the whole of the Aleutian Islands east of that meridian."

By acts of July 27, 1868, March 3, 1869, July 1, 1870, and March 3, 1873, legislation was adopted in relation to the territory thus ceded. These acts, so far as their provisions were of a permanent nature, were afterwards embodied in the Revised Statutes of the United States, §§ 1954-1976.<sup>a</sup>

Legislation of the  
United States.

<sup>a</sup> For a case under § 1956, see *United States v. The Kodiak*, 53 Fed. Rep. 126. As to the Alaskan fisheries, see Sen. Ex. Doc. 50, 40 Cong. 2 sess.

For a proposal to Russia of a convention to establish a reciprocal right to take fish of every kind on the coasts of all the possessions which the United States and Russia then owned or might acquire on the Pacific Ocean, without restriction, and the privilege of drying fish on occupied parts of the coasts, see Mr. Seward, Sec. of State, to Mr. Stoeckl, Russ. min., Oct. 5, 1868, MS. Notes to Russ. Leg. VI. 255.

No attempt was made in them to define the extent of waters to which their provisions applied; nor did any international controversy subsequently take place as to the killing of fur seals in Bering Sea till 1886. In 1889, however, while the question that was raised in 1886 was still pending, an effort was made to amend § 1956, R. S., which prohibits the killing of any otter, mink, marten, sable, or fur seal, or other fur-bearing animal, "within the limits of Alaska Territory, or in the waters thereof," so as to make it "include and apply to all the waters of Bering Sea in Alaska, embraced within the boundary lines mentioned and described in the treaty with Russia . . . by which the Territory of Alaska was ceded to the United States." The amendment passed the House; but was changed in the Senate; and by the bill, as it became a law, March 2, 1889, § 1956 was merely "declared to include and apply to all the dominion of the United States in the waters of Bering Sea."<sup>a</sup>

August 3, 1870, the Acting Secretary of the Treasury, in pursuance of the act of July 1, 1870, leased the privilege of taking fur seals on the islands of St. Paul and St. George to the Alaska Commercial Company, a corporation organized under the laws of the State of California. March 25, 1872, Mr. T. G. Phelps called the attention of the Treasury Department to reports that expeditions were fitting out in San Francisco, Hawaii, and Australia for the purpose of intercepting the seals at the Aleutian Islands; and he suggested whether the act of July 1, 1870, did not authorize interference by means of revenue cutters "to prevent foreigners and others from doing such an irreparable mischief to this valuable interest." Mr. Boutwell, who was then Secretary of the Treasury, April 19, 1872, replied that the Treasury Department had been advised that such an employment of the revenue cutters would not be "a paying one, inasmuch as the seals go singly or in pairs, and not in droves, and cover a large region of water in their homeward travel," and that it was not apprehended that they would be driven from their accustomed resorts, even were such attempts made. "In addition," said Mr. Boutwell, "I do not see that the United States would have the jurisdiction or power to drive off parties going up there for that purpose, unless they made such attempts within a marine league of the shore. As at present advised, I do not think it expedient to carry out your suggestions, but

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<sup>a</sup> 25 Stats. 1009; Congressional Record, 50 Cong. 2 sess. vol. 20, part 3, pp. 2282, 2372, 2426, 2448, 2502, 2563, 2614, 2672; Conrad, Act. At-Gen., May 20, 1896, 21 Op. 346. In view of the award of the Paris tribunal, these words must be construed to mean the water within three marine miles of the shore. (The Alexander, 75 Fed. Rep. 519, 44 C. C. A. 659; Pacific Trading Co. v. United States, *id.*; the La Ninfa, 75 Fed. Rep. 513, 44 C. C. A. 648; Whitelaw v. United States, *id.*)

I will thank you to communicate to the Department any further facts or information you may be able to gather upon the subject.”<sup>a</sup>

March 12, 1881, Mr. French, Acting Secretary of the Treasury, in a letter to Mr. D. A. Ancona, a citizen of San Francisco, took the ground that all the waters eastward of the water line in the treaty of 1867 were “comprised within the waters of Alaska Territory,” and that the penalties prescribed by law against killing fur-bearing animals would therefore attach to violations of the law within those limits.<sup>b</sup> March 16, 1886, a copy of this letter was communicated to the collector of customs at San Francisco, as conveying the construction placed by the Treasury Department on the statutes of the United States.<sup>c</sup>

In September and November, 1886, the British minister at Washington represented that three British Columbian sealing schooners, the *Carolena*, *Onward*, and *Thornton*, had been seized in Bering Sea by the United States revenue cutter *Corwin*; that the master and mate of the *Thornton* had been brought before Judge Dawson, of the United States court at Sitka for trial; that the evidence given by the officers of the revenue cutter showed that the vessel was seized about sixty or seventy miles southeast of St. Georges Island for the offense of hunting and killing seals in that part of Bering Sea east of the water line in the treaty of 1867; that the judge in his charge to the jury, after quoting the first article of that treaty, declared that all the waters east of the line in question were “comprised within the waters of Alaska, and all the penalties prescribed by law against the killing of fur-bearing animals must therefore attach against any violation of law within the limits heretofore described;” that, the jury having found a verdict of guilty, the master of the *Thornton* was sentenced to imprisonment for thirty days and to pay a fine of \$500, and the mate to imprisonment for thirty days and to pay a fine of \$300; and that there was reason to believe that the masters and mates of the *Onward* and *Carolena* had since been tried and sentenced to undergo similar penalties.

In regard to the seizures the Department of State then possessed no information; but on February 3, 1887, Mr. Bayard, who was then

<sup>a</sup> Papers relating to Behring Sea Fisheries, 124-126. In a letter of January 18, 1888, to Mr. W. W. Eaton, then one of the representatives of the Alaska Commercial Company, Mr. Boutwell, referring to the letter which he had written as Secretary of the Treasury, said that, when compared with the letter to which it was a reply, it was apparent that it “had reference solely to the waters of the Pacific Ocean south of the Aleutian Islands.” (House Report 3883, 50 Cong. 2 sess. XII.)

<sup>b</sup> S. Ex. Doc. 106, 50 Cong. sess. 280, 281.

<sup>c</sup> H. Report 3885, 50 Cong. 2 sess. xl. See *United States v. La Nina*, 49 Fed. Rep. 575; *United States v. The James G. Swan*, 50 id. 108; *United States v. The Alexander*, 60 id. 914.

Secretary of State, informed the British minister "that, without conclusion at this time of any questions which may be found to be involved in these cases . . . orders have been issued by the President's direction for the discontinuance of all pending proceedings, the discharge of the vessels referred to, and the release of all persons under arrest in connection therewith."<sup>a</sup>

By formal copies of the judicial proceedings afterwards received in Washington, it appeared that the three vessels in question were condemned October 4, 1886, for having been "found engaged in killing fur seal within the limits of Alaska Territory and in the waters thereof in violation of section 1956 of the Revised Statutes of the United States," and that they were, on February 9, 1887, ordered to be sold. It thus appeared that the condemnation of the vessels rested on the same ground as the conviction and imprisonment of their officers.<sup>b</sup>

In 1887 other vessels were seized, including the *Grace, Dolphin*, and *W. P. Sayward*. October 11, 1887, Judge Dawson filed an opinion in the cases of the *Grace, Dolphin*, and certain other vessels, all of which he declared to be forfeited. His decision was based on the theory of *mare clausum*.<sup>c</sup>

August 19, 1887, Mr. Bayard instructed the ministers of the United States in France, Great Britain, Germany, Japan, Russia, and Sweden and Norway, to request the Governments to which they were accredited to cooperate with the United States "for the better protection of the fur-seal fisheries in Bering Sea." "Without raising any question," said Mr. Bayard, "as to the exceptional measures which the peculiar character of the property in question might justify this Government in taking, and without reference to any exceptional marine jurisdiction that might properly be claimed for that end, it is deemed advisable—and I am

Proposal of cooperation, 1887.

<sup>a</sup> S. Ex. Doc. 106, 50 Cong. 2 sess. 12.

<sup>b</sup> The text of Judge Dawson's charge to the jury in the case of the officers of the *Thornton* on August 30, 1886, may be found at page 113, Appendix 1, Case of the United States, Fur-Seal Arbitration, II. After quoting the language of the first article of the treaty of cession of March 30, 1867, he declared that "Russia had claimed and exercised jurisdiction over all that portion of Bering Sea embraced within the boundary lines set forth in the treaty;" that "that claim had been tacitly recognized and acquiesced in by the other maritime powers of the world for a long series of years prior to the treaty;" and that the dominion of Russia having passed to the United States, "all the waters within the boundary set forth in this treaty to the western end of the Aleutian Archipelago and chain of islands are to be considered as comprised within the waters of Alaska, and all the penalties prescribed by law against the killing of fur-bearing animals must therefore attach against any violation of law within the limits before described."

<sup>c</sup> Case of the United States, App. I. 115-121, Fur-Seal Arbitration, II.



instructed by the President so to inform you—to attain the desired ends by international cooperation.”<sup>a</sup>

The Governments of France, Great Britain, Japan, and Russia promptly made favorable responses, and negotiations with the British and Russian Governments were entered upon at London.<sup>b</sup> In May, 1888, however, they were suspended.

A report on the suspended negotiations was made by Mr. Phelps, United States minister at London, in a dispatch of September 12, 1888. In this report Mr. Phelps stated

Views of Mr.  
Phelps.

that he had had an interview with Lord Salisbury on

the 13th of August, one of the objects of which was to urge the completion of the convention between the United States, Great Britain, and Russia for the protection of the fur seals. This convention had, said Mr. Phelps, “been virtually agreed on verbally, except in its details,” but the consideration of it had been suspended at the request of the Canadian government; and he expressed the opinion that the British Government would not execute it without the concurrence of Canada, and that the concurrence of Canada could not reasonably be expected. Mr. Phelps continued:

“Under these circumstances the Government of the United States must, in my opinion, either submit to have these valuable fisheries destroyed or must take measures to prevent their destruction by capturing the vessels employed in it. Between these alternatives it does not appear to me there should be the slightest hesitation. Much learning has been expended upon the discussion of the abstract question of the right of *mare clausum*. I do not conceive it to be applicable to the present case. Here is a valuable fishery, and a large and, if properly managed, permanent industry, the property of the nations on whose shores it is carried on. It is proposed by the colony of a foreign nation, in defiance of the joint remonstrance of all the countries interested, to destroy this business by the indiscriminate slaughter and extermination of the animals in question, in the open neighboring sea, during the period of gestation, when the common dictates of humanity ought to protect them, were there no interest at all involved. And it is suggested that we are prevented from defending ourselves against such depredations because the sea at a certain distance from the coast is free. The same line of argument would take under its protection piracy and the slave trade, when prosecuted in the open sea, or would justify one nation in destroying the commerce

<sup>a</sup> S. Ex. Doc. 106, 50 Cong. 2 sess. 84. As to a proposal to appoint a close time for the seal fishing, adjacent to Greenland, see Mr. Fish, Sec. of State, to Sir E. Thornton, British min., Sept. 17, 1875, MS. Notes to Great Britain, XVII. 33.

<sup>b</sup> S. Ex. Doc. 106, 50 Cong. 2 sess. 85, 88, 97, 100, 107, 116.

of another by placing dangerous obstructions and derelicts in the open sea near its coasts. There are many things that cannot be allowed to be done on the open sea with impunity, and against which every sea is *mare clausum*. And the right of self-defense as to person and property prevails there as fully as elsewhere. If the fish upon the Canadian coasts could be destroyed by scattering poison in the open sea adjacent, with some small profit to those engaged in it, would Canada, upon the just principles of international law, be held defenseless in such a case? Yet that process would be no more destructive, inhuman, and wanton than this. If precedents are wanting for a defense so necessary and so proper it is because precedents for such a course of conduct are likewise unknown. The best international law has arisen from precedents that have been established when the just occasion for them arose, undeterred by the discussion of abstract and inadequate rules.”<sup>a</sup>

In 1888 no seizures were made, but on August 24, 1889, Mr. Edwards, British chargé d'affaires *ad interim*, called  
**Seizures in 1889.** attention to rumors of fresh seizures. Subsequently he left at the Department of State two communications from Lord Salisbury, both dated Oct. 2, 1888, one of which related to the renewal of the suspended negotiations, while the other protested against the new seizures, on the ground that they were wholly unjustified by international law.

These communications were answered by Mr. Blaine on the 22d of January, 1890. In this reply Mr. Blaine took  
**Positions of Mr. Blaine.** the ground that “the Canadian vessels arrested and detained in the Bering Sea were engaged in a pursuit that was in itself *contra bonos mores*, a pursuit which of necessity involves a serious and permanent injury to the rights of the Government and people of the United States.” To establish this ground it was not necessary, he said, “to argue the question of the extent and nature of the sovereignty of this Government over the waters of the Bering Sea,” or “to define the powers and privileges ceded by His Imperial Majesty the Emperor of Russia in the treaty by which the Alaskan territory was transferred to the United States.” It could not be unknown to Her Majesty’s Government that one of the most valuable sources of revenue from the Alaskan possessions was the fur-seal fisheries of Bering Sea. “Those fisheries had,” said Mr. Blaine.

<sup>a</sup> Case of the United States, Appendix I. 181–183. Fur Seal Arbitration. II.

“My endeavors to establish by international cooperation measures for the prevention of the extermination of fur-seals in Bering Sea have not been relaxed, and I have hopes of being enabled shortly to submit an effective and satisfactory conventional *projet* with the maritime powers for the approval of the Senate.” (President Cleveland, annual message, Dec. 3, 1888, For. Rel. 1888. I. p. xii.)

“ been exclusively controlled by the Government of Russia, without interference or without question, from their original discovery until the cession of Alaska to the United States in 1867,” and in like manner by the Government of the United States from 1867 to 1886, when “ certain Canadian vessels asserted their right to enter, and by their ruthless course to destroy the fisheries ” and with them “ the resulting industries ” which were so valuable. The Government of the United States at once proceeded to check this movement, and it was, Mr. Blaine declared, a cause of “ unfeigned surprise ” that Her Majesty’s Government should immediately interfere to defend, and encourage by defending, the course of the Canadians “ in disturbing an industry which had been carefully developed for more than ninety years under the flags of Russia and the United States.” So great had been the injury from this irregular and destructive slaughter in the open waters of Bering Sea that the Government of the United States had been compelled to reduce the number of seals allowed to be taken on the islands from 100,000 to 60,000 annually. It was doubtful, said Mr. Blaine, whether Her Majesty’s Government would abide by the three-mile rule, on which it was sought to defend the Canadian sealers, if an attempt were made to interfere with the pearl fisheries of Ceylon, which extended more than twenty miles from the shore line, which were enjoyed by England without molestation, and which Her Majesty’s Government felt authorized to sell the right to engage in, from year to year, to the highest bidder; nor was it credible that destructive modes of fishing on the Grand Banks of Newfoundland, by the explosion of dynamite or giant powder, would be justified or even permitted by Great Britain on the plea that the vicious acts were committed more than three miles from shore. Why were not the two cases parallel? The Canadian vessels were engaged in the taking of fur seals in a manner that insured the extermination of the species, in order that “ temporary and immoral gain ” might be acquired by a few persons. “ The law of the sea,” continued Mr. Blaine, “ is not lawlessness.” One step beyond the protection of acts which were immoral in themselves and which inevitably tended to results against the interests and welfare of mankind, and piracy would find its justification. The forcible resistance to which the United States was constrained in Bering Sea was, declared Mr. Blaine, in the President’s judgment, “ demanded not only by the necessity of defending the traditional and long-established rights of the United States, but also the rights of good government and of good morals the world over.” The President was persuaded that “ all friendly nations ” would “ concede to the United States the same rights and privileges on the lands and in the waters of Alaska

which the same friendly nations always conceded to the Empire of Russia."<sup>a</sup>

On June 5, 1890, the British minister left at the Department of State a copy of an instruction of the Marquis of Salisbury of May 22, 1890, in answer to Mr. Blaine's note of the 22nd of January. With regard to the argument advanced in that note, Lord Salisbury said it was obvious that two questions were involved: First, whether the pursuit and killing of fur seals in certain parts of the open sea were, from the point of view of international morality, an offense *contra bonos mores*, and, secondly, whether, if such were the case, this fact justified the seizure on the high seas and subsequent confiscation in time of peace of the private vessels of a friendly nation. Referring to a special message of President Tyler to Congress of February 27, 1843, Lord Salisbury said it was an axiom of international maritime law that such action was admissible only in the case of piracy or in pursuance of special international agreement. The pursuit of seals in the open sea had never been considered as piracy by any civilized state. Even in the case of the slave trade, a practice which the civilized world had agreed to look upon with abhorrence, the right of arresting the vessels of another country could be exercised only by special international agreement, and no one government had been allowed that general control of morals in this respect which Mr. Blaine claimed on behalf of the United States in regard to seal hunting. But Her Majesty's Government, said Lord Salisbury, must also question whether the killing of seals could of itself be regarded as *contra bonos mores*, unless and until for special reasons it had been agreed by international arrangement to forbid it. Fur seals were indisputably animals *feræ naturæ*, and these had universally been regarded by jurists as *res nullius* until they were caught, and no person, therefore, could have property in them until he had actually reduced them to possession by capture. As to the argument that the fur-seal fisheries had been exclusively controlled by Russia and the United States successively down to 1886, Lord Salisbury quoted from the correspondence in relation to the ukase of 1821 and from certain subsequent correspondence to show that Russia had enjoyed no monopoly of the fisheries. He also denied that from 1867 to 1886 the enjoyment of the seal fisheries by the United States was uninterrupted, and he quoted the reports of various officials of the United States from 1870 to 1884 in support of this denial. As to the argument that the taking of seals

<sup>a</sup> Mr. Blaine, Sec. of State, to Sir J. Pouncefote, Brit. min., Jan. 22, 1890, For. Rel. 1890, 366-370. The negotiations for a commission of experts and a *modus vivendi*, which took place subsequently to the foregoing correspondence, are here omitted. They are fully detailed in Moore, Int. Arbitrations, I. 787-793. See, also, North Am. Commercial Co. v. United States (1898), 171 U. S. 110.

in the open sea rapidly led to their extinction, he declared that the statement would admit of reply, and that abundant evidence could be adduced on the other side, but that, as it had been proposed that this question should be examined by a commission of experts to be appointed by the two Governments, it was not necessary to deal with it on the present occasion. The negotiations then in progress in Washington proved, he said, the readiness of Her Majesty's Government to consider whether any special international agreement was necessary for the protection of the fur-seal industry, and in its absence they were unable to admit that the case put forward on behalf of the United States afforded any sufficient justification for the forcible action already taken against peaceable subjects of Her Britannic Majesty engaged in lawful operations on the high seas.<sup>a</sup>

To this communication Mr. Blaine replied on the 30th of June in a note to Sir Julian Pauncefote. This note, which **Mr. Blaine's argument as to Russian rights in Behring Sea.** is of considerable length, is almost wholly devoted to an argument to show that the jurisdictional claim of Russia put forth in the ukase of 1821 was acquiesced in by Great Britain and the United States north of the sixtieth parallel of north latitude. Mr. Blaine contended that the protest of Mr. Adams was not against the Russian claim itself, but against its extension southward to the fifty-first degree of north latitude; that the term "Continent of America," as used by Mr. Adams, was employed not in the geographical sense, but to distinguish the territory of "America" from the territory of the "Russian possessions;" that the phrase "Northwest coast" was used in two senses—one including the northwest coast of the Russian possessions, and the other merely the coast of America whose northern limit was the sixtieth parallel of north latitude, and that it was used by Mr. Adams, as well as by British statesmen at the time, in the latter sense. Mr. Blaine also contended that in the treaties concluded by the United States and Great Britain with Russia in 1824 and 1825 there was no "attempt at regulating or controlling, or even asserting an interest in, the Russian possessions and the Bering Sea, which lie far to the north and west of the territory which formed the basis of the contention." He argued that the terms "Great Ocean," "Pacific Ocean," and "South Sea" did not include the Bering Sea. The treaties in question were, he contended, a practical renunciation both on the part of England and the United States of any rights in the waters of Bering Sea during the period of Russia's sovereignty. In regard to the waters of that sea, he declared that the ukase of 1821 stood unmodified, and that both the United States and Great Britain recognized, respected, and obeyed it. Whatever duty Great Britain owed to Alaska as a Russian province was not, he declared, changed by the mere fact of-

<sup>a</sup> For. Rel. 1890, 419-424.

the transfer of sovereignty to the United States; and in conclusion he reasserted that no destructive intrusion by sealers into Bering Sea began until 1886.\*

The answer of Lord Salisbury to this note bears date the 2d of August. In this answer Lord Salisbury maintained **Lord Salisbury's answer and offer of arbitration.** that the protest of Mr. Adams covered the whole of the extraordinary jurisdictional claim made in the ukase of 1821, and that in all the correspondence there was no reference to any distinctive name for Bering Sea, or any intimation that it could be considered otherwise than as forming an integral part of the Pacific Ocean. When Mr. Adams declared that the United States "could admit no part" of the claims set forth in the ukase, his clear object was to deny that the Russian settlements gave Russia any right to exclude the navigation or fishery of other nations over any part of the sea on the coast of America; and such, also, was the object of the treaties of 1824 and 1825. Lord Salisbury also quoted extracts from the instructions given by Mr. George Canning to Mr. Stratford Canning, when the latter was named as minister plenipotentiary to negotiate the treaty of 1825, by which it appeared, first, that England refused to admit any part of the claim asserted in the ukase of 1821 to an exclusive jurisdiction of one hundred Italian miles from the coast from Bering Straits to the fifty-first parallel of north latitude: second, that the convention of 1825 was regarded on both sides as a renunciation by Russia of that claim in its entirety, and, third, that, though Bering Straits were known and specifically provided for, Bering Sea was not known by that name, but was regarded as part of the Pacific Ocean. Lord Salisbury further contended that the public right to fish, catch seals, or pursue any other lawful occupation on the high seas could not be held to be abandoned by a nation from the mere fact that for a certain number of years it had not suited the subjects of that nation to exercise it; and in conclusion he proposed that if the Government of the United States, after an examination of the evidence and argument which he had produced, should still differ from Her Majesty's Government as to the legality of the recent captures in Bering Sea, the question, together with the issues that depended upon it, should be referred to impartial arbitration.\*

To this communication Mr. Blaine replied on the 17th of December, and at the outset he observed that legal and diplomatic questions, apparently complicated, were **Mr. Blaine's reply; the "Pacific Ocean;" questions for arbitration.** often found, after prolonged discussion, to depend upon the settlement of a single point. Such was, he said, the position of the United States and Great Britain. Great Britain contended that the phrase "Pacific Ocean," as

\*For. Rel. 1890, 437-448; H. Ex. Doc. 450, 51 Cong. 1 sess.    †For. Rel. 1890, 456-465.

used in the treaties of 1824 and 1825, included Bering Sea; the United States contended that it did not. If Great Britain could maintain her position on this point, the Government of the United States had, Mr. Blaine declared, "no well-grounded complaint against her." If, on the other hand, the United States could prove that Bering Sea at the date of the treaties was understood by the three signatory powers to be a separate body of water, and was not included in the phrase "Pacific Ocean," then the American case against Great Britain was "complete and undeniable." Mr. Blaine then renewed and amplified the arguments which he had previously advanced to show that the term "Pacific Ocean" was not intended to include Bering Sea.<sup>a</sup>

In answer to the offer of Lord Salisbury to arbitrate, Mr. Blaine proposed five questions on which, in the opinion of the President, a substantial arbitration might be had. The first four related to the jurisdictional rights of Russia and their transfer to the United States. The fifth related to the rights of the United States as to the fur-seal fishery in the waters of Bering Sea outside of the ordinary territorial limits, whether such rights grew out of the cession by Russia, or "of the ownership of the breeding islands and the habits of the seals in resorting thither and rearing their young thereon and going out from the islands for food, or out of any other fact or incident connected with the relation of those seal fisheries to the territorial possessions of the United States." If the determination of the foregoing questions should leave the subject in such a position that the concurrence of Great Britain was necessary for the protection of the fur seal, it was further proposed that the tribunal of arbitration should determine what measures were necessary for that purpose. In conclusion, Mr. Blaine declared that the repeated assertions that the United States demanded that the Bering Sea be pronounced *mare clausum*, were without foundation. "The Government," he said, "has never claimed it and never desired it. It expressly disavows it."<sup>b</sup> He further stated that the views of the President were well expressed by Mr. Phelps in his dispatch of September 12, 1888, and from this dispatch he then cited the passage which has already been quoted.<sup>c</sup>

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<sup>a</sup> He also referred to an act of the British Parliament, passed after the transportation of Napoleon to the island of St. Helena, by which power was assumed to exclude ships of any nationality not only from landing on the island, but from hovering within eight leagues of its coast, and to the case of the pearl fisheries in the Indian Ocean, under the control of the British Government.

<sup>b</sup> "For several years [prior to 1890] the United States, asserting that it had territorial jurisdiction over Bering Sea, had been striving to prevent vessels of foreign nations from seal hunting on the open waters thereof." (Fuller, C. J., in *North Am. Commercial Co. v. United States* (1898), 171 U. S. 110, 132.)

<sup>c</sup> Message of Jan. 5, 1891, H. Ex. Doc. 144, 51 Cong. 2 sess.; For. Rel. 1890, 477.

On the 21st of February, 1891, Lord Salisbury replied to this note. Agreement on a *modus vivendi*. controverting the argument advanced in it as to the meaning of the treaties of 1824 and 1825, and proposing certain modifications of the questions to be submitted to arbitration.<sup>a</sup>

Mr. Blaine rejoined on the 14th of April.<sup>b</sup> Meanwhile the two Governments had entered upon the consideration of a *modus vivendi*, which had been suggested by Mr. Blaine under the instructions of the President, for the suspension or restriction of sealing pending the result of the arbitration of the questions at issue between the two Governments. This correspondence continued till the 15th of June, 1891, when a *modus vivendi* was agreed upon.<sup>c</sup> By this agreement Great Britain undertook to prohibit, until the following May, the killing of seals by British subjects in that part of Bering Sea lying eastward of the line of demarcation described in the treaty between the United States and Russia of 1867, and the United States to prohibit the like killing of seals by citizens of the United States in the same part of Bering Sea and on the islands thereof, in excess of 7,500 be taken on the islands for the subsistence and care of the natives. It was further agreed that, in order to facilitate such inquiries as Her Majesty's Government might desire to make with a view to the presentation of their case before arbitrators, suitable persons designated by Great Britain should be permitted at any time, upon application, to visit and remain on the seal islands during the pending season for that purpose.<sup>d</sup>

This agreement was at once proclaimed by the President, "to the end that the same and every part thereof might be observed and fulfilled with good faith by the United States of America and the citizens

<sup>a</sup> For. Rel. 1891, 542. In January, 1891, a motion was made before the Supreme Court of the United States for leave to file an application for a writ of prohibition to the district court of the United States for the district of Alaska, to restrain the enforcement of the sentence of condemnation and forfeiture entered on September 19, 1887, in the case of the *W. P. Sayward*, one of the British Columbian sealers, on the ground that the court was without jurisdiction in the premises. Leave having been granted, the application was duly filed. The petitioner for the writ was one Cooper, the owner of the *Sayward*, but with his petition a suggestion was presented by Sir John Thompson, attorney-general of Canada, with the knowledge and approval of the Imperial Government, requesting the aid of the court for the claimant, a British subject. The case was argued on November 9 and 10, 1891, and was decided February 29, 1892, the day on which the treaty of arbitration was signed. The application was denied on technical grounds, relating to the law and practice governing the issuance of writs of prohibition. (*In re Cooper*, 143 U. S. 472.)

<sup>b</sup> For. Rel. 1891, 548.

<sup>c</sup> For. Rel. 1891, 552-570. See President Harrison's annual message of Dec. 9, 1891. See, also, *North American Commercial Co. v. United States*, 171 U. S. 110.

<sup>d</sup> For. Rel. 1891, 570.



thereof." It was put in force in Great Britain by an order in council, issued under an act passed on June 11, 1891, "to enable Her Majesty, by order in council, to make special provision for prohibiting the catching of seals in Bering's Sea by Her Majesty's subjects during the period named in the order."<sup>a</sup>

A treaty of arbitration was signed at Washington, February 29, 1892. By the first article of the treaty it was provided  
**Treaty of arbitra-** that the questions which had arisen between the two  
**-tion.** Governments "concerning the jurisdictional rights of the United States in the waters of Bering's Sea, and concerning also the preservation of the fur seal in, or habitually resorting to, the said sea, and the rights of the citizens and subjects of either country as regards the taking of fur seal in, or habitually resorting to, the said waters," should be submitted to a tribunal of seven arbitrators, two to be named by the President of the United States, two by Her Britannic Majesty, and one each by the President of France, the King of Italy, and the King of Sweden and Norway. The questions submitted to arbitration were defined by Articles VI. and VII. By Article VI. five questions were submitted for specific judgment. Article VII. referred to the arbitrators the subject of concurrent regulations, in case their judgment on the five questions in the preceding article should be adverse to the United States. The text of Article VI. and VII. is as follows:

"ARTICLE VI. In deciding the matter submitted to the arbitrators, it is agreed that the following five points shall be submitted to them, in order that their award shall embrace a distinct decision upon each of said five points, to wit:

"1. What exclusive jurisdiction in the sea now known as the Bering's Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

"2. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?

"3. Was the body of water now known as the Bering's Sea included in the phrase 'Pacific Ocean,' as used in the treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Bering's Sea were held and exclusively exercised by Russia after said treaty?

"4. Did not all the rights of Russia as to jurisdiction, and as to the seal fisheries in Bering's Sea east of the water boundary, in the treaty between the United States and Russia of the 30th March, 1867, pass unimpaired to the United States under that treaty?

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<sup>a</sup> Case of the United States, Appendix I. 323, Fur-Seal Arbitration, II.

"5. Has the United States any right, and if so, what right of protection or property in the fur seals frequenting the islands of the United States in Bering Sea when such seals are found outside the ordinary three-mile limit?"

"ARTICLE VII. If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Bering Sea, the arbitrators shall then determine what concurrent Regulations outside the jurisdictional limits of the respective Governments are necessary, and over what waters such regulations should extend, and to aid them in that determination the report of a joint commission to be appointed by the respective Governments shall be laid before them, with such other evidence as either Government may submit.

"The high contracting parties furthermore agree to cooperate in securing the adhesion of other powers to such regulations."<sup>a</sup>

Article VIII. of the treaty related to damages, which had formed a subject of much difficulty and occasioned not a little delay in the negotiations. By this article it was provided that the high contracting parties, "having found themselves unable to agree upon a reference which shall include the question of the liability of each for the injuries alleged to have been sustained by the other, or by its citizens, in connection with the claims presented and urged by it, either may submit to the arbitrators any question of fact involved in said claims and ask for a finding thereon, the question of the liability of either Government upon the facts found to be the subject of further negotiation."

On the 18th of April, 1892, a *modus vivendi* was concluded in the form of a convention. In its first, second, third, and fourth articles it embodied the provisions of the *modus vivendi* of 1891. By its fifth article it introduced the subject of damages, which had been postponed by the treaty of arbitration. This article read as follows:

"ARTICLE V. If the result of the arbitration be to affirm the right of British sealers to take seals in Bering Sea within the bounds claimed by the United States, under its purchase from Russia, then compensation shall be made by the United States to Great Britain

<sup>a</sup> It was agreed that any regulations made by the arbitrators within the powers given them by this article were obligatory on the two Governments, and were not merely recommendations which it was open to either Government to disregard. (Mr. Wharton, Act. Sec. of State, to Sir J. Pauncefote, Brit. min. March 6, 1893. MS. Notes to Gr. Br. XXII. 275, in reply to a note of Sir J. Pauncefote of March 2.)

(for the use of her subjects) for abstaining from the exercise of that right during the pendency of the arbitration upon the basis of such a regulated and limited catch or catches as in the opinion of the arbitrators might have been taken without an undue diminution of the seal-herds; and, on the other hand, if the result of the arbitration shall be to deny the right of British sealers to take seals within the said waters, then compensation shall be made by Great Britain to the United States (for itself, its citizens and lessees) for this agreement to limit the island catch to seven thousand five hundred a season, upon the basis of the difference between this number and such larger catch as in the opinion of the arbitrators might have been taken without an undue diminution of the seal-herds.

"The amount awarded, if any, in either case shall be such as under all the circumstances is just and equitable, and shall be promptly paid."

The treaty of arbitration was approved by the Senate of the United States on March 29, 1892, and the convention for the renewal of the *modus vivendi* on the 19th of April. Both instruments were ratified by the President on the 22d of April, and their ratifications were exchanged on the 7th of May. On the 9th of May they were duly proclaimed.<sup>a</sup> As American arbitrators the President of the United States named the Hon. John M. Harlan, a justice of the Supreme Court of the United States, and the Hon John T. Morgan, a Senator of the United States. On the part of Great Britain the arbitrators named were the Right Hon. Lord Hannen, of the high court of appeal, and the Hon. Sir John Thompson, minister of justice and attorney-general for Canada. As neutral arbitrators the President of France named the Baron Alphonse de Courcel, a Senator and ambassador of France; the King of Italy, the Marquis Emilio Visconti Venosta, a Senator of the Kingdom and formerly minister of foreign affairs; and the King of Sweden and Norway, Mr. Gregers Gram, a minister of state.<sup>b</sup> As agent the United States appointed the Hon. John W. Foster, who subsequently held the office of Secretary of State. The British Government designated as its agent the Hon. Charles H. Tupper, minister of marine and fisheries for the

<sup>a</sup> See President Harrison's annual message of Dec. 6, 1892.

<sup>b</sup> The treaty provided that the foreign powers designated to select arbitrators should be requested to choose, if possible, jurists acquainted with the English language. The object of this stipulation was merely to facilitate the disposition of the business. (Mr. Wharton, Act. Sec. of State, to Mr. Vignaud, chargé, May 27, 1902, MS. Inst. France, XXII. 331; Mr. Wharton, Acting Sec. of State, to Mr. Coolidge, min. to France, tel. June 23, 1892, MS. Inst. France, XXII. 349; Mr. Foster, Sec. of State, to Mr. Coolidge, min. to France, tel. July 5, 1892, MS. Inst. France, XXII. 354; Mr. Uhl, Act. Sec. of State, to Mr. Eustis, amb. to France, June 20, 1894, MS. Inst. France, XXII. 657.)

Dominion of Canada, while Mr. R. P. Maxwell, of the foreign office, acted as assistant agent and Mr. Charles Russell as solicitor.

As counsel for the United States there were retained the Hon. Edward J. Phelps, Mr. James C. Carter, the Hon. Henry W. Blodgett, and Mr. F. R. Coudert. Mr. Robert Lansing and Mr. William Williams acted with them as associate counsel. Counsel on the part of Great Britain were Sir Charles Russell, Q. C., M. P., Her Majesty's attorney-general; Sir Richard Webster, Q. C., M. P., and Mr. Christopher Robinson, Q. C., of Canada; and they were assisted by Mr. H. M. Box, barrister at law.<sup>a</sup>

In the counter case of the United States reference was made to "Russia's action during the summer of 1892," as the first-known instance of the warning or seizure of vessels by that Government for killing seals in the waters of Bering Sea. It seems that there was one seizure by Russia, or under Russian authority, of a foreign vessel for taking seals in Bering Sea prior to the cases in 1892. This was the case of the British Columbian schooner *Araunah* in 1888. The master of the schooner alleged that she was seized off Copper Island about six miles from the nearest land. The captors alleged that she was nearer. It appeared, however, that the crew of the schooner were carrying on their operations in canoes between the schooner and the land, and it was affirmed that two of the canoes were within half a mile of the shore. Lord Salisbury said Her Majesty's Government were "of opinion that, even if the *Araunah* at the time of the seizure was herself outside the three-mile territorial limit, the fact that she was, by means of her boats, carrying on fishing within Russian waters without the prescribed license warranted her seizure and confiscation according to the provisions of the municipal law regulating the use of those waters." The "provisions of the municipal law" referred to by Lord Salisbury were the regulations relating to "trading, hunting, and fishing" "on the Russian coast or islands in the Okhotsk and Bering seas, or on the northeastern coast of Asia, or within their sea boundary line," which were published in San Francisco and in Japanese ports in 1881 and 1882.<sup>b</sup> These regulations were made the subject of inquiry by the Government of the United States at the time through its diplomatic representative at St. Petersburg, and the correspondence was published in the volume of Foreign Relations for 1882. M. de Giers, the Russian minister of foreign affairs, in a note of May 8 (20), 1882, stated that the regulations extended "strictly to the territorial waters of Russia only."<sup>c</sup> The vessel seized by the

<sup>a</sup> As to the cases and counter cases of the two Governments, and the arguments of counsel, see Moore, Int. Arbitrations, I. 806-823, 826-827, 827-904.

<sup>b</sup> Blue Book "Russia No. 1 (1890)."

<sup>c</sup> For. Rel. 1882, pp. 447-451, 452-454. The inquiry of the United States related to cod fishing; in the case of the *Araunah* M. de Giers stated that the regulations governed sealing also.

Russian authorities in 1892 were six in number.<sup>a</sup> In regard to four of them the evidence was conclusive that their canoes were taking seals within the three-mile limit. In regard to the other two, though it was said that the "moral evidence" of the same fact was equally conclusive, yet as the canoes were not actually seen within territorial waters the Russian Government undertook to make indemnity.<sup>b</sup> On February 12 (24), 1893, however, the Russian minister of foreign affairs, in response to an inquiry made in behalf of Canadian sealers as to the limits within which they would be permitted to carry on their operations during that year, wrote to the British ambassador that "the insufficiency of the strict application of general rules of international law to this matter" was admitted in the negotiations between Russia, Great Britain, and the United States in 1888, and that the necessity for exceptional measures had been "more lately confirmed by the Anglo-American agreement of 1891," which had placed Russian interests in an "absolutely abnormal and exceptional position." "The prohibition of sealing within the limits agreed upon in the *modus vivendi* of 1891 has, in fact," said the Russian minister of foreign affairs, "caused such an increase in the destruction of seals on the Russian coast that the complete disappearance of these animals would be only a question of a short time unless efficacious measures for their protection were taken without delay." On these grounds he stated that for the ensuing season, and pending the adoption of international regulations, Russia would, as a measure of "legitimate self-defense," prohibit sealing within ten miles of all her coasts, and within thirty miles of the Commander Islands and Robben Island.<sup>c</sup> The British Government declined to admit that Russia had

<sup>a</sup> When these seizures of 1892 were referred to in the counter case of the United States, the precise facts were not known. The diplomatic correspondence was published in Great Britain while the tribunal of arbitration was in session. See Moore, *Int. Arbitrations*, I. 911.

<sup>b</sup> Blue Book "Russia No. 3 (1893)." See Mr. White, min. to Russia, to Mr. Gresham, Sec. of State, June 17, 1893, MSS. Dept. of State.

<sup>c</sup> In explanation of the grounds of these measures, the minister of foreign affairs said: "With regard to the ten-mile zone along the coast, these measures will be justified by the fact that vessels engaged in the seal fishery generally take up positions at a distance of from seven to nine miles from the coast, while their boats and crews engage in sealing both on the coast itself and in territorial waters. As soon as a cruiser is sighted, the ships take to the open sea and try to recall their boats from territorial waters. With regard to the thirty-mile zone around the islands, this measure is taken with a view to protect the banks, known by the sealers as 'sealing grounds,' which extend round the islands, and are not shown with sufficient accuracy on maps. These banks are frequented during certain seasons by the female seals, the killing of which is particularly destructive to the seal species at the time of year when the females are suckling their young, or go to seek food on the banks known as 'sealing grounds.'"

a right to extend her jurisdiction over British vessels outside the usual territorial limits, but in order "to afford all reasonable and legitimate assistance to Russia in the existing circumstances," expressed a readiness at once to enter into an agreement with the Imperial Government for the enforcement of the protective zones proposed in the note of the minister of foreign affairs. Such an agreement was concluded in May, 1893.<sup>a</sup>

**Award.** August 15, 1893, the tribunal of arbitration made the following award:

*"Award of the Tribunal of Arbitration constituted under the Treaty concluded at Washington, the 29th of February 1892, between the United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland.*

"Whereas by a Treaty between the United States of America and Great Britain, signed at Washington, February 29, 1892, the ratifications of which by the Governments of the two Countries were exchanged at London on May the 7<sup>th</sup>, 1892, it was, amongst other things, agreed and concluded that the questions which had arisen between the Government of the United States of America and the Government of Her Britannic Majesty, concerning the jurisdictional rights of the United States in the waters of Bering's Sea, and concerning also the preservation of the fur-seal in or habitually resorting to the said sea, and the rights of the citizens and subjects of either Country as regards the taking of fur-seals in or habitually resorting to the said waters, should be submitted to a Tribunal of Arbitration to be composed of seven Arbitrators, who should be appointed in the following manner, that is to say: two should be named by the President of the United States; two should be named by Her Britannic Majesty; His Excellency the President of the French Republic should be jointly requested by the High Contracting Parties to name one; His Majesty the King of Italy should be so requested to name one; His Majesty the King of Sweden and Norway should be so requested to name one; the seven Arbitrators to be so named should be jurists of distinguished reputation in their respective Countries, and the selecting Powers should be requested to choose, if possible, jurists who are acquainted with the English language;

"And whereas it was further agreed by article II of the said Treaty that the Arbitrators should meet at Paris within twenty days after the delivery of the Counter-Cases mentioned in article IV, and should proceed impartially and carefully to examine and decide the questions which had been or should be laid before them as in the said Treaty provided on the part of the Governments of the United States and of

<sup>a</sup> Blue Book "Russia No. 1 (1893)."

Her Britannic Majesty respectively, and that all questions considered by the Tribunal, including the final decision, should be determined by a majority of all the Arbitrators;

“And whereas by article VI of the said Treaty, it was further provided as follows: ‘In deciding the matters submitted to the said Arbitrators, it is agreed that the following five points shall be submitted to them in order that their award shall embrace a distinct decision upon each of said five points, to wit:

“‘1. What exclusive jurisdiction in the sea now known as the Bering’s Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

“‘2. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?

“‘3. Was the body of water now known as the Bering’s Sea included in the phrase *Pacific Ocean*, as used in the Treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Bering’s Sea were held and exclusively exercised by Russia after said Treaty?

“‘4. Did not all the rights of Russia as to jurisdiction and as to the seal fisheries in Bering’s Sea east of the water boundary, in the Treaty between the United States and Russia of the 30<sup>th</sup> of March 1867, pass unimpaired to the United States under that Treaty?

“‘5. Has the United States any right, and if so, what right of protection or property in the fur-seals frequenting the islands of the United States in Bering Sea when such seals are found outside the ordinary three-mile limit?’

“And whereas, by article VII of the said Treaty, it was further agreed as follows:

“‘If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Behring Sea, the Arbitrators shall then determine what concurrent Regulations, outside the jurisdictional limits of the respective Governments, are necessary, and over what waters such Regulations should extend;

“‘The High Contracting Parties furthermore agree to cooperate in securing the adhesion of other Powers to such Regulations;’

“And whereas, by article VIII of the said Treaty, after reciting that the High Contracting Parties had found themselves unable to agree upon a reference which should include the question of the liability of each for the injuries alleged to have been sustained by the other, or by its citizens, in connection with the claims presented and urged by it, and that ‘they were solicitous that this subordinate ques-

tion should not interrupt or longer delay the submission and determination of the main questions,' the High Contracting Parties agreed that 'either of them might submit to the Arbitrators any question of fact involved in said claims and ask for a finding thereon, the question of the liability of either Government upon the facts found, to be the subject of further negotiation;'

"And whereas the President of the United States of America named the Honourable John M. Harlan, Justice of the Supreme Court of the United States, and the Honourable John T. Morgan, Senator of the United States, to be two of the said Arbitrators, and Her Britannic Majesty named the Right Honourable Lord Hannen and the Honourable Sir John Thompson, Minister of Justice and Attorney General for Canada, to be two of the said Arbitrators, and His Excellency the President of the French Republic named the Baron de Courcel, Senator, Ambassador of France, to be one of the said Arbitrators, and His Majesty the King of Italy named the Marquis Emilio Visconti Venosta, former Minister of Foreign Affairs and Senator of the Kingdom of Italy, to be one of the said Arbitrators, and His Majesty the King of Sweden and Norway named Mr. Gregers Gram, Minister of State, to be one of the said Arbitrators:

"And whereas We, the said Arbitrators, so named and appointed, having taken upon ourselves the burden of the said arbitration, and having duly met at Paris, proceeded impartially and carefully to examine and decide all the questions submitted to us the said Arbitrators, under the said Treaty, or laid before us as provided in the said Treaty on the part of the Governments of Her Britannic Majesty and the United States respectively;

"Now we, the said Arbitrators, having impartially and carefully examined the said questions, do in like manner by this our Award decide and determine the said questions in manner following, that is to say, we decide and determine as to the five points mentioned in article VI as to which our Award is to embrace a distinct decision upon each of them:

"As to the first of the said five points, We, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta and Mr. Gregers Gram, being a majority of the said Arbitrators, do decide and determine as follows:

"By the Ukase of 1821, Russia claimed jurisdiction in the sea now known as the Behring's Sea, to the extent of 100 Italian miles from the coasts and islands belonging to her, but, in the course of the negotiations which led to the conclusion of the Treaties of 1824 with the United States and of 1825 with Great Britain, Russia admitted that her jurisdiction in the said sea should be restricted to the reach of cannon shot from shore, and it appears that, from that time up to the time of the cession of Alaska to the United States,



Russia never asserted in fact or exercised any exclusive jurisdiction in Behring's Sea or any exclusive rights in the seal fisheries therein beyond the ordinary limits of territorial waters.

"As to the second of the said five points, We, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta and Mr. Gregers Gram, being a majority of the said Arbitrators, do decide and determine that Great Britain did not recognize or concede any claim, upon the part of Russia, to exclusive jurisdiction as to the seal fisheries in Behring Sea, outside of ordinary territorial waters.

"As to the third of the said five points, as to so much thereof as requires us to decide whether the body of water now known as the Behring Sea was included in the phrase 'Pacific Ocean' as used in the Treaty of 1825 between Great Britain and Russia, We, the said Arbitrators, do unanimously decide and determine that the body of water now known as the Behring Sea was included in the phrase 'Pacific Ocean' as used in the said Treaty.

"And as to so much of the said third point as requires us to decide what rights, if any, in the Behring Sea were held and exclusively exercised by Russia after the said Treaty of 1825, We, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta and Mr. Gregers Gram, being a majority of the said Arbitrators, do decide and determine that no exclusive rights of jurisdiction in Behring Sea and no exclusive rights as to the seal fisheries therein, were held or exercised by Russia outside of ordinary territorial waters after the Treaty of 1825.

"As to the fourth of the said five points, We, the said Arbitrators, do unanimously decide and determine that all the rights of Russia as to jurisdiction and as to the seal fisheries in Behring Sea, east of the water boundary, in the Treaty between the United States and Russia of the 30<sup>th</sup> March 1867, did pass unimpaired to the United under the said Treaty.

"As to the fifth of the said five points, We, the said Baron de Courcel, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta and Mr. Gregers Gram, being a majority of the said arbitrators, do decide and determine that the United States has not any right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit.

"And whereas the aforesaid determination of the foregoing questions as to the exclusive jurisdiction of the United States mentioned in Article VI leaves the subject in such a position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in or

habitually resorting to the Behring Sea, the Tribunal having decided by a majority as to each Article of the following Regulations. We, the said Baron de Courcel, Lord Hannen, Marquis Visconti Venosta and Mr. Gregers Gram, assenting to the whole of the nine Articles of the following regulations, and being a majority of the said Arbitrators, do decide and determine in the mode provided by the Treaty, that the following concurrent Regulations outside the jurisdictional limits of the respective Governments are necessary and that they should extend over the waters hereinafter mentioned, that is to say:

“ARTICLE 1.

“The Governments of the United States and of Great Britain shall forbid their citizens and subjects respectively to kill, capture or pursue at any time and in any manner whatever, the animals commonly called fur seals, within a zone of sixty miles around the Pribilof Islands, inclusive of the territorial waters.

“The miles mentioned in the preceding paragraph are geographical miles, of sixty to a degree of latitude.

“ARTICLE 2.

“The two Governments shall forbid their citizens and subjects respectively to kill, capture or pursue, in any manner whatever, during the season extending, each year, from the 1<sup>st</sup> of May to the 31<sup>st</sup> of July, both inclusive, the fur seals on the high sea, in the part of the Pacific Ocean, inclusive of the Behring sea, which is situated to the North of the 35<sup>th</sup> degree of North latitude, and eastward of the 180<sup>th</sup> degree of longitude from Greenwich till it strikes the water boundary described in Article 1 of the Treaty of 1867 between the United States and Russia, and following that line up to Behring straits.

“ARTICLE 3.

“During the period of time and in the waters in which the fur seal fishing is allowed, only sailing vessels shall be permitted to carry on or take part in fur-seal fishing operations. They will however be at liberty to avail themselves of the use of such canoes or undecked boats, propelled by paddles, oars, or sails, as are in common use as fishing boats.

“ARTICLE 4.

“Each sailing vessel authorised to fish for fur seals must be provided with a special license issued for that purpose by its Government and shall be required to carry a distinguishing flag to be prescribed by its Government.

## "ARTICLE 5.

"The masters of the vessels engaged in fur seal fishing shall enter accurately in their official log book the date and place of each fur seal fishing operation, and also the number and sex of the seals captured upon each day. These entries shall be communicated by each of the two Governments to the other at the end of each fishing season.

## "ARTICLE 6.

"The use of nets, fire arms and explosives shall be forbidden in the fur seal fishing. This restriction shall not apply to shot guns when such fishing takes place outside of Behring's sea, during the season when it may be lawfully carried on.

## "ARTICLE 7.

"The two Governments shall take measures to control the fitness of the men authorized to engage in fur seal fishing; these men shall have been proved fit to handle with sufficient skill the weapons by means of which this fishing may be carried on.

## "ARTICLE 8.

"The regulations contained in the preceding articles shall not apply to Indians dwelling on the coasts of the territory of the United States or of Great Britain, and carrying on fur seal fishing in canoes or undecked boats not transported by or used in connection with other vessels and propelled wholly by paddles, oars or sails and manned by not more than five persons each in the way hitherto practised by the Indians, provided such Indians are not in the employment of other persons and provided that, when so hunting in canoes or undecked boats, they shall not hunt fur seals outside of territorial waters under contract for the delivery of the skins to any person.

"This exemption shall not be construed to affect the Municipal law of either country, nor shall it extend to the waters of Behring Sea or the waters of the Aleutian Passes.

"Nothing herein contained is intended to interfere with the employment of Indians as hunters or otherwise in connection with fur sealing vessels as heretofore.

## "ARTICLE 9.

"The concurrent regulations hereby determined with a view to the protection and preservation of the fur seals, shall remain in force until they have been, in whole or in part, abolished or modified by

common agreement between the Governments of the United States and of Great Britain.

“The said concurrent regulations shall be submitted every five years to a new examination, so as to enable both interested Governments to consider whether, in the light of past experience, there is occasion for any modification thereof.

“And whereas the Government of Her Britannic Majesty did submit to the Tribunal of Arbitration by article VIII of the said Treaty certain questions of fact involved in the claims referred to in the said article VIII, and did also submit to us, the said Tribunal, a statement of the said facts, as follows, that is to say:

“‘FINDINGS OF FACT PROPOSED BY THE AGENT OF GREAT BRITAIN AND AGREED TO AS PROVED BY THE AGENT FOR THE UNITED STATES, AND SUBMITTED TO THE TRIBUNAL OF ARBITRATION FOR ITS CONSIDERATION.

“‘1. That the several searches and seizures, whether of ships or goods, and the several arrests of masters and crews, respectively mentioned in the Schedule to the British Case, pages 1 to 60 inclusive, were made by the authority of the United States Government. The questions as to the value of the said vessels or their contents or either of them, and the question as to whether the vessels mentioned in the Schedule to the British Case, or any of them, were wholly or in part the actual property of citizens of the United States, have been withdrawn from and have not been considered by the Tribunal, it being understood that it is open to the United States to raise these questions or any of them, if they think fit, in any future negotiations as to the liability of the United States Government to pay the amounts mentioned in the Schedule to the British Case;

“‘2. That the seizures aforesaid, with the exception of the “Pathfinder” seized at Neah-Bay, were made in Behring Sea at the distances from shore mentioned in the Schedule annexed hereto marked “C;”

“‘3. That the said several searches and seizures of vessels were made by public armed vessels of the United States, the commanders of which had, at the several times when they were made, from the Executive Department of the Government of the United States, instructions, a copy of one of which is annexed hereto, marked “A” and that the others were, in all substantial respects, the same: that in all the instances in which proceedings were had in the District Courts of the United States resulting in condemnation, such proceedings were begun by the filing of libels, a copy of one of which is annexed hereto, marked “B”, and that the libels in the other proceedings were in all substantial respects the same: that the alleged acts or offences for

which said several searches and seizures were made were in each case done or committed in Behring Sea at the distances from shore aforesaid; and that in each case in which sentence of condemnation was passed, except in those cases when the vessels were released after condemnation, the seizure was adopted by the Government of the United States; and in those cases in which the vessels were released the seizure was made by the authority of the United States; that the said fines and imprisonments were for alleged breaches of the municipal laws of the United States, which alleged breaches were wholly committed in Behring Sea at the distances from the shore aforesaid;

“4. That the several orders mentioned in the Schedule annexed hereto and marked “C” warning vessels to leave or not to enter Behring Sea were made by public armed vessels of the United States the commanders of which had, at the several times when they were given, like instructions as mentioned in finding 3, and that the vessels so warned were engaged in sealing or prosecuting voyages for that purpose, and that such action was adopted by the Government of the United States;

“5. That the District courts of the United States in which any proceedings were had or taken for the purpose of condemning any vessel seized as mentioned in the Schedule to the Case of Great Britain, pages 1 to 60, inclusive, had all the jurisdiction and powers of Courts of Admiralty, including the prize jurisdiction, but that in each case the sentence pronounced by the Court was based upon the grounds set forth in the libel.

“ANNEX A.

“TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,

“Washington, April 21, 1886.

“SIR,

“Referring to Department letter of this date, directing you to proceed with the revenue-steamer *Bear*, under your command, to the seal Islands, etc., you are hereby clothed with full power to enforce the law contained in the provisions of Section 1956 of the United States' Revised Statutes, and directed to seize all vessels and arrest and deliver to the proper authorities any or all persons whom you may detect violating the law referred to, after due notice shall have been given.

“You will also seize any liquors or fire-arms attempted to be introduced into the country without proper permit, under the provisions of Section 1955 of the Revised Statutes, and the Proclamation of the President dated 4<sup>th</sup> February, 1870.

“Respectfully yours,

“Signed: C. S. FAIRCHILD,

“Acting Secretary.

“Captain M. A. HEALY,

“Commanding revenue-steamer *Bear*, San-Francisco, California.”

## "ANNEX B.

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

"AUGUST SPECIAL TERM, 1886.

"To the Honourable Lafayette Dawson, Judge of said District Court :

"The libel of information of M. D. Ball, Attorney for the United States for the District of Alaska, who prosecutes on behalf of said United States, and being present here in Court in his proper person, in the name and on behalf of the said United States, against the schooner *Thornton*, her tackle, apparel, boats, cargo, and furniture, and against all persons intervening for their interest therein, in a cause of forfeiture, alleges and informs as follows :

"That Charles A. Abbey, an officer in the Revenue Marine Service of the United States, and on special duty in the waters of the district of Alaska, heretofore, to wit, on the 1<sup>st</sup> day of August, 1886, within the limits of Alaska Territory, and in the waters thereof, and within the civil and judicial district of Alaska, to wit, within the waters of that portion of Behring sea belonging to the said district, on waters navigable from the sea by vessels of 10 or more tons burden, seized the ship or vessel commonly called a schooner, the *Thornton*, her tackle, apparel, boats, cargo, and furniture, being the property of some person or persons to the said Attorney unknown, as forfeited to the United States, for the following causes :

"That the said vessel or schooner was found engaged in killing fur-seal within the limits of Alaska Territory, and in the waters thereof, in violation of section 1956 of the Revised Statutes of the United States.

"And the said Attorney saith that all and singular the premises are and were true, and within the Admiralty and maritime jurisdiction of this Court, and that by reason thereof, and by force of the Statutes of the United States in such cases made and provided, the afore mentioned and described schooner or vessel, being a vessel of over 20 tons burden, her tackle, apparel, boats, cargo, and furniture, became and are forfeited to the use of the said United States, and that said schooner is now within the district aforesaid.

"Wherefore the said Attorney prays the usual process and monition of this honourable Court issue in this behalf, and that all persons interested in the before-mentioned and described schooner or vessel may be cited in general and special to answer the premises, and all due proceedings being had, that the said schooner or vessel, her tackle, apparel, boats, cargo, and furniture may, for the cause aforesaid, and others appearing, be condemned by the definite sentence and decree of this honourable Court, as forfeited to the use of the said United States, according to the form of the Statute of the said United States in such cases made and provided.

"Signed: M. D. BALL,

"United States District Attorney for the District of Alaska.

## "ANNEX C.

"The following table shows the names of the British sealing-vessels seized or warned by United States revenue cruizers 1886-1890, and the approximate distance from land when seized. The distances assigned in the cases of the *Carolena*, *Thornton* and *Onward* are on the authority of U. S. Naval Commander Abbey (see 50<sup>th</sup> Congress, 2<sup>d</sup> Session, Senate Executive Documents N° 106, pp. 20, 30, 40). The distances assigned in the cases of the *Anna Beck*, *W. P. Sawyer*, *Dolphin* and *Grace* are on the authority of Captain Shepard U. S. R. M. (*Blue Book*, United States N° 2, 1890.—pp. 80-82. See Appendix, vol. III.)

Name of vessel.	Date of seizure.	Approximate distance from land when seized.	United States vessel making seizure.
Carolena.....	August 1 1886	75 miles	Corwin.
Thornton.....	August 1 1886	70 miles	Corwin.
Onward.....	August 2 1886	115 miles	Corwin.
Favourite.....	August 2 1886	Warned by Corwin in about same position as Onward.	
Anna Beck.....	July 2 1887	66 miles	Rush.
W. P. Sayward.....	July 9 1887	59 miles	Rush.
Dolphin.....	July 12 1887	40 miles	Rush.
Grace.....	July 17 1887	96 miles	Rush.
Alfred Adams.....	August 10 1887	62 miles	Rush.
Ada.....	August 25 1887	15 miles	Bear.
Triumph.....	August 4 1887	Warned by Rush not to enter Behring Sea	
Juanita.....	July 31 1889	66 miles	Rush.
Pathfinder.....	July 29 1889	50 miles	Rush.
Triumph.....	July 11 1889	Ordered out of Behring Sea by Rush. (?) As to position when warned.	
Black Diamond.....	July 11 1889	36 miles	Rush.
Lily.....	August 6 1889	66 miles	Rush.
Ariel.....	July 30 1889	Ordered out of Behring Sea by Rush	
Kate.....	August 13 1889	Ditto	
Minnie.....	July 15 1889	65 miles	Rush.
Pathfinder.....	March 27 1890	Seized in Neah Bay *	Corwin.

\* Neah Bay is in the State of Washington, and the *Pathfinder* was seized there on charges made against her in the Behring Sea in the previous year. She was released two days later.

"And whereas the Government of Her Britannic Majesty did ask the said Arbitrators to find the said facts as set forth in the said statement, and whereas the Agent and Counsel for the United States Government thereupon in our presence informed us that the said statement of facts was sustained by the evidence, and that they had agreed with the Agent and Counsel for Her Britannic Majesty that We, the Arbitrators, if we should think fit so to do, might find the said statement of facts to be true.

"Now, We, the said Arbitrators, do unanimously find the facts as set forth in the said statement to be true.

"And whereas each and every question which has been considered by the Tribunal has been determined by a majority of all the Arbitrators;

"Now We, Baron de Courcel, Lord Hannen, Mr. Justice Harlan, Sir John Thompson, Senator Morgan, the Marquis Visconti Venosta and Mr. Gregers Gram, the respective minorities not withdrawing their votes, do declare this to be the final Decision and Award in writing of this Tribunal in accordance with the Treaty.

"Made in duplicate at Paris and signed by us the fifteenth day of August in the year 1893.

"And We do certify this English Version thereof to be true and accurate.

"ALPH. DE COURCEL.

"JOHN M. HARLAN.

"JOHN T. MORGAN.

"HANNEN.

"JNO S D THOMPSON.

"VISCONTI VENOSTA.

"G. GRAM."

*"Declarations made by the Tribunal of Arbitration and Referred to the Governments of the United States and Great Britain for their consideration.*

" I.

"The Arbitrators declare that the concurrent Regulations, as determined upon by the Tribunal of Arbitration, by virtue of article VII of the Treaty of the 29<sup>th</sup> of February 1892, being applicable to the high sea only, should, in their opinion, be supplemented by other Regulations applicable within the limits of the sovereignty of each of the two Powers interested and to be settled by their common agreement.

" II.

"In view of the critical condition to which it appears certain that the race of fur-seals is now reduced in consequence of circumstances not fully known, the Arbitrators think fit to recommend both Governments to come to an understanding in order to prohibit any killing of fur-seals, either on land or at sea, for a period of two or three years, or at least one year, subject to such exceptions as the two Governments might think proper to admit of.

"Such a measure might be recurred to at occasional intervals if found beneficial.

" III.

"The Arbitrators declare moreover that, in their opinion, the carrying out of the Regulations determined upon by the Tribunal of Arbitration, should be assured by a system of stipulations and measures to be enacted by the two Powers; and that the Tribunal must, in consequence, leave it to the two Powers to decide upon the means for giving effect to the Regulations determined upon by it.

"We do certify this English version to be true and accurate and have signed the same at Paris this 15<sup>th</sup> day of August 1893.

" ALPH DE COURCEL.

" JOHN M. HARLAN.

*"I approve declarations I. and III.*

" HANNEN.

*"I approve declarations I. and III.*

" JNO S D THOMPSON.

" JOHN T. MORGAN.

" VISCONTI VENOSTA.

" G. GRAM."

By an act of February 21, 1893,<sup>a</sup> it was provided that whenever the Government of the United States should conclude an effective



international arrangement for the protection of the fur seals in the north Pacific Ocean, by agreement with any other power or as the result of the pending arbitration, the laws of the United States for the protection of the fur seals and other fur-bearing animals within the limits of Alaska and in the waters thereof should by a proclamation of the President be extended over all that portion of the Pacific Ocean included in such international arrangement. The result of the arbitration having rendered this act inappropriate, an act was approved April 6, 1894, for executing the regulations of the Paris tribunal, and a similar act was passed in Great Britain.<sup>a</sup> No agreement for the temporary suspension of sealing was effected.

The damages claimed by Great Britain as growing out of the controversy amounted to \$542,169.26, without interest, which was demanded at the rate of 7 per cent. On August 21, 1894, Mr. Gresham, Secretary of State, offered, as the result of a somewhat extended negotiation, the sum of \$425,000 in full and final settlement of all claims, "subject to the action of Congress on the question of appropriating the money." "The President," said Mr. Gresham, "can only undertake to submit the matter to Congress at the beginning of its session in December next, with a recommendation that the money be appropriated and made immediately available for the purpose above expressed, and if at any time before the appropriation is made your [the British] Government shall desire, it is understood that the negotiations on which we have for some time been engaged for the establishment of a mixed commission will be renewed." The offer was accepted by Sir Julian Pauncefort on these terms.<sup>b</sup> At the ensuing session Congress did not appropriate the money, and the negotiations for a mixed commission were renewed.<sup>c</sup>

On February 8, 1896, a convention was concluded at Washington by Mr. Olney, Secretary of State, and Sir Julian Pauncefote for the appointment of two commissioners, one by the United States and the other by Great Britain, to meet and sit at Victoria, and also, if either commissioner should formerly so request, to sit at San Francisco for the purpose of determining the claims for damages. The convention included by designation the cases of the *Wanderer* (1887-1889), *Winifred* (1891), *Henrietta* (1892), and *Oscar and Hattie* (1892), in addition to the cases mentioned in the findings of fact of the Paris tribunal.<sup>d</sup>

As commissioners under this convention, the United States ap-

<sup>a</sup> 28 Stat. 52; S. Ex. Doc. 67, 53 Cong. 3 sess.; For. Rel. 1894, App. I. 107-233.

<sup>b</sup> H. Ex. Doc. 132, 53 Cong. 3 sess.

<sup>c</sup> Annual Message of President Cleveland, Dec. 2, 1895.

<sup>d</sup> For. Rel. 1896, 281-285.

pointed the Hon. William L. Putnam, a judge of the circuit court of the United States, while the British Government named the Hon. George Edwin King, a judge of the supreme court of Canada. Any cases in which the commissioners might be unable to agree were, by the terms of the convention, to be referred to an umpire to be appointed by the two Governments or, if they should disagree, by the President of Switzerland. The commissioners, however, were able to reach a decision without resort to an umpire. Their award bears date December 17, 1897.<sup>a</sup> In conformity with this award the Secretary of State delivered to the British ambassador at Washington, June 16, 1898, a draft for the sum of \$473,151.26, the money having been duly appropriated by Congress.<sup>b</sup>

An act to carry into effect the regulations prescribed by the arbitrators was approved by the President of the United States April 6, 1894. An act called the Bering Sea award act, 1894, was passed by Parliament April 23, 1894, for the same purpose. Under the act of Congress, where a vessel was seized, having in its possession prohibited arms or implements, or sealskins, or the bodies of seals, in the closed season, the burden of proving innocence was placed upon the master.<sup>c</sup> A similar presumption, though it was created by the British act of 1891,<sup>d</sup> was omitted by that of 1894; and this and other questions created difficulties in the enforcement of the regulations.<sup>e</sup>

The Japanese Government agreed to take measures to prevent

<sup>a</sup> Moore, Int. Arbitrations, II. 2123.

<sup>b</sup> For. Rel. 1898, 371-373. The act of Congress of June 15, 1898, by which the money was appropriated, declared that the appropriation was made without admitting any liability for the loss of prospective profits by British vessels engaged in pelagic sealing, or for interest on the sums awarded to Great Britain, and without admitting the authority of the arbitrators to make any award for the arrest or detention of vessels not included in the submission contained in the treaty under which the arbitration was held.

<sup>c</sup> Report of Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxxii. See, also, *United States v. The Jane Gray* (1896), 77 Fed. Rep. 908; *United States v. The James G. Swan* (1896), 77 Fed. Rep. 473.

<sup>d</sup> *The Oscar & Hattie v. The Queen*, 23 Canada Supreme Court, 396.

<sup>e</sup> As to the enforcement of the regulations, see For. Rel. 1894, App. I. 107-233; S. Ex. Doc. 67, 53 Cong. 3 sess.; For. Rel. 1895, I. 590-592, 615, 616, 643-660; For. Rel. 1896, 255-281; For. Rel. 1897, 258-289; S. Doc. 40, 55 Cong. 2 sess.

As to the cases of the *Wanderer* and the *Favorite*, see Harmon, At. Gen., Oct. 3, 1895, 21 Op. 234, 239; Griggs, At. Gen., May 4, 1898, 22 Op. 64; For. Rel. 1895, I. 677.

As to the unsuccessful efforts of the United States to secure assent to the prohibition of pelagic sealing, see For. Rel. 1894, App. I. 228; For. Rel. 1895, I. 610, 615, 665-666; President Cleveland, ann. message, Dec. 7, 1896; Report of Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxxii; President McKinley, ann. message, Dec. 6, 1897; For. Rel. 1897, 258-289; S. Doc. 40, 55 Cong. 2 sess.

foreign vessels from using the flag of Japan to evade the regulations, but declined to require Japanese vessels to observe them unless protection should in like manner be given to the Japanese seal fisheries.<sup>a</sup> President Cleveland stated, in his annual message of December 3, 1894, that only France and Portugal had signified their willingness to adhere to the Paris regulations: The Danish Government declined to do so on the ground that no Danish ships were engaged in seal hunting in the waters in question.<sup>b</sup> The Russian Government consented to adhere to the regulations only on condition that they be extended to the whole of the Pacific Ocean north of the 35° of latitude.<sup>c</sup>

**British-Russian arrangement.** An order in council was issued on the 21st of November, 1895, under the seal fisheries act, 1895, to give effect to an arrangement with Russia. It prohibited the catching of seals by British ships in certain "prohibited zones," namely, (1) a zone of ten marine miles on all the Russian coasts of Bering Sea and the North Pacific Ocean, and (2) a zone of thirty marine miles around the Kormandorsky Islands and Tulenew (Robben) Islands.<sup>d</sup> Provision was made for the visit and seizure of British ships by Russian officers in the designated zones, subject to certain conditions. Where a Russian officer detained a British ship or her certificate of registry he was required, as soon as possible, to hand over the ship or transmit the certificate, as the case might be, to the commanding officer of a British cruiser or to the nearest British authority, and also to satisfy such officer or authority that there were reasonable grounds for the seizure and that the case was proper to be adjudicated in a British court, as well as to furnish the evidence sufficient for such adjudication.<sup>e</sup>

#### 4. UNITED STATES AND RUSSIAN ARBITRATION.

### § 173.

**Diplomatic correspondence.** "I have had a number of interviews with Prince Cantacuzene, the Russian minister, on the same subject [i. e., Russia's position as to the protection of fur seals on the high seas]. . . . When I called the minister's attention to information which had been received indicating a purpose on the

<sup>a</sup> Mr. Dun, mln. to Japan, to Mr. Gresham, Sec. of State, tel., Nov. 27, 1893, MS. Inst. Japan, IV. 147, replying to Mr. Gresham, Sec. of State, to Mr. Dun, mln. to Japan, tel., Nov. 22, 1893, MS. Inst. Japan, IV. 145.

<sup>b</sup> For. Rel. 1895, I. 600-661.

<sup>c</sup> For. Rel. 1895, I. 585; II. 1117. See also For. Rel. 1896, 285-289.

<sup>d</sup> As to the arrest in the autumn of 1895, and the conviction and imprisonment by the Russian authorities, of seventeen persons, including five citizens of the United States, for seal poaching on Robben Island, see For. Rel. 1896, 495-507.

<sup>e</sup> For. Rel. 1895, I. 681-682.

part of his Government to make concessions to Great Britain inconsistent with the right asserted by the United States before the Paris tribunal, he informed me that Mr. Blaine positively refused to allow the Russian Government to become a party to that treaty, and it was therefore obliged to take care of itself as best it could; that his Government did not believe the right asserted by the United States to property in the seals on the high seas was valid, and that Russia could not, therefore, assume the attitude of the United States on that question. I can not resist the belief that in these statements the minister represented the real position of the Russian Government."

Mr. Gresham, Sec. of State, to Mr. White, min. to Russia, No. 112, July 14, 1893, MS. Inst. Russia, XVII. 177.

"I have to acknowledge the receipt of your despatch No. 109 of the 6th ultimo, transmitting the inquiry of the director of the Asiatic department of the foreign office of the Imperial Government, as to whether the United States will object to the seizure by Russian cruisers of American vessels poaching Russian seals.

"In view of the questions submitted to the Paris tribunal of arbitration and the probability of an early determination of the same, I think the matter may be safely left in abeyance. The long and uninterrupted friendly relations between the United States and Russia, is a guaranty that neither will do anything which would make the solution of any question arising between them, growing out of poaching in the Bering Sea, difficult of solution.

"If it be true that Russia sympathizes with the United States in the present controversy submitted to the Paris tribunal, and believes the right which we asserted is well founded, it is difficult to understand why that Government agreed to make indemnity for the seizure of two British vessels poaching in the Bering Sea near the eastern shore."

Mr. Gresham, Sec. of State, to Mr. White, min. to Russia, No. 113, July 14, 1893, MS. Inst. Russia, XVII. 179.

"I have to acknowledge the receipt of your despatch No. 205 of January 22, 1896, in reply to the Department's instruction No. 146 of November 22, 1895.

"In that instruction you were directed to ascertain with special reference to the seizure in 1892 of the American fishing vessels *Kate* and *Anna*, *C. H. White*, and *James Hamilton Lewis*, whether the Imperial Government accepts the Paris tribunal's decision as a correct statement of the limits of Russian jurisdiction in Bering Sea at that time.

"In the note from the Russian foreign office inclosed in your No. 146, that question is not specifically answered, but the right of Russia

to seize the above-named vessels in Bering Sea twenty or more miles from any Russian land is defended by reference to the claim of Russian jurisdiction in Bering Sea made by the United States in its contention with Great Britain before the Paris tribunal. 'Although it is true,' the minister says, 'that the Imperial Government, as you have had the goodness to remark, was not one of the parties among whom the differences submitted to arbitration had arisen, that is to say, England and the United States, it is not the less to be expected that the Cabinet at Washington, which maintained before the tribunal of arbitration the widest doctrines, will not depart from that breadth of view in the solution to be given equally to matters of arrest of American vessels to which allusion is made in the note before mentioned, although previous to the conclusion of the arrangement of 1894.'

'The question to be considered in the present controversy is simply whether Russia had a right to seize the American fishing vessels named in the place where they were seized in the year 1892. The question of the preservation of the fur seal is not involved, and the provisions of the *modus vivendi* signed May 4/April 22, 1894, are inapplicable to the solution of the point in issue. It is true that the United States took the position in diplomatic correspondence with Great Britain, and asserted before the Paris tribunal, that Russia had, and had exercised, certain exclusive jurisdictional rights in Bering Sea beyond the ordinary three-mile limit, but this contention was declared by the arbitrators, with only one dissenting voice, to be untenable. Their decision was as follows:

'By the ukase of 1821 Russia claimed jurisdiction in the sea now known as the Behring Sea to the extent of 100 Italian miles from the coasts and islands belonging to her, but, in the course of the negotiation which led to the conclusion of the treaties of 1824 with the United States and of 1825 with Great Britain, Russia admitted that her jurisdiction in the said sea should be restricted to the reach of cannon shot from shore, and it appears that from that time up to the time of the cession of Alaska to the United States, Russia has never asserted in fact, or exercised any exclusive jurisdiction in Behring's Sea or any exclusive rights in the seal fisheries therein beyond the ordinary limit of territorial waters.'

'Mr. Justice Harlan, one of the arbitrators chosen by the United States, made an elaborate historical and legal review of the proposition, and expressed the following conclusion in an opinion which he read to the commission, before the award was made: '*To the first.*—Prior to and up to the time of the cession of Alaska to the United States, Russia did not assert nor exercise any exclusive jurisdiction in Behring Sea, or any exclusive rights in the fur seal fisheries in

that sea, *outside of ordinary territorial waters*, except that in the ukase of 1821 she did assert the right to prevent foreign vessels from approaching nearer than 100 Italian miles the coasts and islands named in that ukase. But, pending the negotiations to which that ukase gave rise, Russia voluntarily suspended its execution, so far as to direct its officers to restrict their surveillance of foreign vessels to the distance of cannon shot from the shores mentioned, and by the treaty of 1824 with the United States, as well as by that of 1825 with Great Britain, the above ukase was withdrawn, and the claim of authority, or the power to prohibit foreign vessels from approaching the coasts nearer than 100 Italian miles was abandoned, by the agreement embodied in those treaties to the effect that the respective citizens and subjects of the high contracting parties should not be troubled or molested, in any part of the great ocean commonly called the Pacific Ocean, either in navigating the same or in fishing therein, or in landing at such parts of the coast as shall not have been already occupied, in order to trade with the natives, under the restrictions and conditions specified in other articles of those treaties.' (Fur Seal Arbitration, vol. 1, p. 110.)

"While the Paris tribunal was sitting upon the question of Russian jurisdiction in Bering Sea, that Government tendered a pecuniary indemnity to Great Britain for the seizure of two British vessels in Bering Sea near the eastern shore, but outside the three-mile limit, while refusing at the same time indemnity for the seizure of four other British vessels which had taken seals within the three-mile limit. This transaction was reported to the Department in your predecessor's despatch No. 111 of June 17, 1893.

"This acknowledgment by Russia that her exclusive jurisdiction stopped within the ordinary three-mile limit in Bering Sea as well as in other portions of the Pacific was used with effect by Great Britain before the Paris tribunal. July 14, 1893, Mr. Gresham, Secretary of State, said to your predecessor: 'If it be true that Russia sympathizes with the United States in the present controversy submitted to the Paris tribunal, and believes the right which we asserted is well founded, it is difficult to understand why that Government agreed to make an indemnity for the seizure of two British vessels poaching in Bering Sea near the eastern shore.'

"Again, the efforts now being made by Russia to induce the powers interested to extend the regulations for fur-seal fishing in Bering Sea to all the waters of the Pacific Ocean north of the 35th degree of latitude, indicates and implies an acceptance of the decision of the Paris tribunal, and a general policy in consonance with its findings.

"In replying to your inquiry, the Russian foreign office seems to have carefully avoided asserting a distinct claim to sovereign rights

in Bering Sea. It merely expresses the assumption that this Government will assent to a settlement of these claims on the basis of its contention before the Paris tribunal. To this you are instructed to say in reply that the United States regards the decision of the Paris tribunal as an authoritative declaration of international law, the effect of which is not even drawn in question by any decisions of a contrary character; which on the other hand is both sound in principle and sanctioned by uniform usage; and which has been most emphatically affirmed by the practice and conduct of Russia herself. The decision is directly applicable to the seizures in question, which are parallel in all essential particulars with the British cases referred to, and are entitled to the same consideration at the hands of the Russian Government.

"You are requested to lay the foregoing views before the Russian foreign office with the least practicable delay, and to insist that the question of the amount of the indemnity to be paid on account of such seizures is the only real question for discussion and should be taken up and disposed of with all reasonable despatch."

Mr. Olney, Sec. of State, to Mr. Breckinridge, min. to Russia, April 25, 1896, MS. Inst. Russia, XVII. 444.

"In our own relations with Russia we have recently had an illustration of the absence of binding force of generally accepted principles of international law. I refer to the case of the *James Hamilton Lewis* and the reply of the Russian Government, referred to in the embassy's No. 177 of the 11th instant, in which the Russian Government, finding that the generally accepted principle of a jurisdiction extending 3 miles out to sea is inadequate to the defense of its case, claims that the limit of marine jurisdiction should be considered, in view of modern conditions, as extending to at least 5 miles from shore."

Mr. Peirce, chargé d'aff. ad. int. at St. Petersburg, to Mr. Hay, Sec. of State, Nov. 9, 1898, For. Rel. 1898, 546, 549.

By an agreement concluded at St. Petersburg August 26/Sept. 8, 1900, claims for indemnity growing out of the seizures by the Russian cruisers were submitted to Mr. T. M. C. Asser, member of the council of state of the Netherlands. It was stipulated that the judgment in each case should be governed by the general principles of the law of nations and the spirit of international agreements applicable to the matter. With reference to this stipulation, the arbitrator observed that it was conceded that it should have no retroactive force, and that he should apply to the cases only the principles of the law of nations and the international treaties which were in force and obligatory on the parties at the time of the seizures.

The arbitrator found that the *Cape Horn Pigeon*, a whaling bark, having sailed from San Francisco, December 7, 1891, with a crew of thirty persons, under the command of a captain named Scullan, was, on September 10, 1892, while engaged in fishing for whales in the Sea of Okhotsk, on the high seas, seized by a Russian cruiser and taken to Vladivostok, where she was detained till October 1, 1902. In this case it was admitted that the commander of the Russian cruiser had been in error in his suspicions that the bark was engaged in an illicit pursuit, and the Russian Government offered to pay a proper indemnity, so that the duty of the arbitrator in this case was confined to fixing the amount. He awarded \$38,750, with interest at six per cent from September 9, 1892, till the day of payment. The award included an allowance not only for damage actually suffered, but also for loss of the profits which would have been made in the natural course of things.

In the case of the schooner *James Hamilton Lewis* it was alleged by the claimants that the vessel was seized August 2, 1891, by a Russian cruiser, about 20 miles from the island of Cuivre; that the schooner was first compelled to lie to by a shot from the cruiser, and was then boarded by a Russian officer in a small boat, who, after taking the ship's papers back with him to the cruiser, returned with some armed men and ordered the master to go as a prisoner on board the cruiser, with all his crew except seven men; that the master refused to obey the order and made an effort to get away; that the cruiser then began a pursuit, and, overhauling the schooner, captured her, and conducted her, with her crew, to Vladivostok; that the schooner, with her equipment and cargo and the personal property of her master, was confiscated, and that her master, officers, and crew were held as prisoners and subjected to severe treatment. Damages were claimed to the amount of \$101,336, with interest at 6% per annum.

On the part of the Russian Government it was maintained that the schooner, when first seen by the cruiser, was only 5 miles from the island of Medny or Cuivre, and that she was seized at a place only 11 or 12 miles distant from the shore; that it was to be inferred from a series of circumstances that the schooner had been guilty of hunting seals in Russian territorial waters, and that the Russian officers were therefore justified in pursuing her outside those waters and in seizing and confiscating her, together with the cargo, and that the imprisonment of the crew was caused by their resistance to the arrest and seizure of the ship.

On July 4, 1902, the agent of the United States, Mr. Peirce, made, by specific authority of his Government in reply to a question of the arbitrator, the following declaration:

"The Government of the United States claims, neither in Bering



Sea nor in its other bordering waters, an extent of jurisdiction greater than a marine league from its shores, but bases its claims to such jurisdiction upon the following principle:

"The Government of the United States claims and admits the jurisdiction of any state over its territorial waters only to the extent of a marine league unless a different rule is fixed by treaty between two states; even then the treaty states are alone affected by the agreement."

The arbitrator, after observing that there existed between the United States and Russia at the time of the seizure no convention regulating the taking of fur seals in such manner as to affect the ordinary rules of jurisdiction under the law of nations, declared that, whether the seizure took place 20 or only 11 miles from land, it was made outside Russian territorial waters; that the contention that a ship of war might pursue outside territorial waters a vessel whose crew had committed an unlawful act in the territorial waters or on the territory of the state, was not in conformity with the law of nations, since the jurisdiction of the state could not be extended beyond the territorial sea, unless by express convention; and that it was therefore unnecessary to consider the alleged grounds for inferring that the vessel had been guilty of the illegal hunting of seals in the territorial waters or on the territory of Russia. An award was made in favor of the claimants for \$28,588, with interest at 6 per cent.

In the case of the schooner *C. H. White*, it was admitted on the part of Russia that the seizure took place about 23 miles from the Russian coast, but was alleged, as in the preceding case, that it was to be inferred from a series of circumstances that the vessel had been guilty of hunting seals illegally in Russian territorial waters. The arbitrator, applying the same principles as in the case of the *James Hamilton Lewis*, awarded \$32,444, with interest at six per cent per annum.

August 12, 1892, the American schooner *Kate and Anna*, when on the high seas about 30 miles from the nearest Russian land, was brought to by a Russian cruiser, whose commander, after requiring the master of the schooner to bring his papers on board for examination, ordered 124 sealskins which were then on the schooner to be delivered up and declared them to be confiscated, on the assumption that the master had been sealing in Russian territorial waters. The Russian Government, in view of the lack of "positive proofs" of the master's guilt, and as evidence of a desire to maintain the most friendly relations with the American Government, admitted its obligation to make indemnity for the loss, to the amount of \$1,240 (124 skins at \$10), with interest at 6 per cent from August 12, 1902. The arbitrator awarded \$1,488 (124 skins at \$12), with interest.

## VII. VESSELS.

## § 174.

It is often stated that a ship on the high seas constitutes a part of the territory of the nation whose flag it flies. In the physical sense, this phrase obviously is metaphorical. *Acts at sea.* In the legal sense, it means that a ship on the high seas is subject to the exclusive jurisdiction of the nation to which, or to whose citizens, it belongs. The jurisdiction is quasi territorial.

Woolsey, Int. Law, § 54; Field, Int. Code, § 309; 95 North Am. Rev. (July 1862), 8; *Crupe v. Kelly*, 16 Wall. 610; *Wilson v. McNamee*, 102 U. S. 572, 574; *Re Mohcan*, 14 Fed. Rep. 44.

The belligerent right of visitation and search forms an exception to this rule. The only general exception, in time of peace, is that of piracy *jure gentium*. The scene of the pirate's operations being the high seas, and his crime being treated as a renunciation of the protection of the flag which he may carry, he is treated as an outlaw, whom any nation may capture and punish.

Dr. F. de Martens, as arbitrator in the case of the *Costa Rica Packet*, held that the Dutch courts were incompetent to entertain a prosecution of the master of a British whaler for taking some liquor from an alleged Dutch prauw (native boat), which was floating derelict at sea, outside territorial waters. (*Moore, Int. Arbitrations*, V. 4953.)

"I have no doubt that an offence, committed on board a public ship of war, on the high seas, is committed within the jurisdiction of the nation to whom the ship belongs."

President Adams to Mr. Pickering, Sec. of State, May 21, 1799. *John Adams' Works*, VIII. 651.

See *Moore on Extradition*, I. 135, § 104. A sentry on the U. S. S. *Independence* was indicted under § 8 of the act of Congress of April 30, 1790, for murder, in killing the cook's mate on board ship in Boston harbor. Held, that the statute did not confer jurisdiction on the United States courts where the place was within the jurisdiction of a State. (*United States v. Bevans* (1818), 3 Wheaton, 336.)

Complaint having been made that the marine court of the city of New York had assumed jurisdiction to try and punish the master of a Sardinian vessel for an assault and battery alleged to have been committed by him upon two of his seamen on the high seas, the following reply was made: "If this was the position of the *Phebo* when the alleged assault was committed the jurisdiction of this matter belongs exclusively to the Government of Sardinia, and such would no doubt have been the decision of the court of appeals in New York if the case had been brought before it. . . . Were there such a law of New York as is alleged, it would not give jurisdiction over the case. . . . ; but the law has been misapprehended. Upon examination of sec. 4, title 7, of the New York Code of Procedure giving jurisdiction

to the marine court it does not appear that this law was designed to confer on that court power to decide cases arising on board foreign merchant vessels on the high seas. It provides that the marine court shall have jurisdiction 'in an action by or against any person belonging to or on board of a vessel in the merchant service, for an assault and battery or false imprisonment committed on board such vessel upon the high sea or in a place without the United States of which the ordinary courts of law of this State have jurisdiction.' The vessels referred to in that law can only mean merchant vessels of the United States. The jurisdiction of the ordinary courts of law therein alluded to is that derived from the laws of the United States. The acts of Congress authorize State courts to take cognizance of certain cases arising on merchant vessels, but it is always understood to mean vessels of the United States only, as Congress could neither exercise nor extend its control over any other; and the object of the law of New York was to include the marine court among those authorized to enforce the act of Congress."

Mr. Marcy, Sec. of State, to Chevalier Bertinatti, Sardinian min., Dec. 1, 1858, MS. Notes to Italian States, VI. 178.

See, to the same effect, Mr. Forsyth, Sec. of State, to Mr. Harrison, Dec. 7, 1837, 7 MS. Desp. to Consuls, 180.

"Both the public and private vessels of every nation on the high seas and out of the territorial limits of any other state are subject to the jurisdiction of the state to which they belong, and this jurisdiction is exclusive so far as respects offences against the local laws of the vessel's nation."

Mr. Fish, Sec. of State, to Gen. Schenck, min. to England, Nov. 8, 1873, MS. Inst. Gr. Br. XXIII. 431.

"Merchant vessels on the high seas being constructively considered as for most purposes a part of the territory of the nation to which they belong, they are not subject to the criminal laws and processes of another nation; and any attempt of the officers or citizens of the latter to execute and serve such laws and processes on board of them can only be regarded as an illegal proceeding which their masters and crews are justified not only in disregarding but also in resisting."

Mr. Blaine, Sec. of State, to Mr. Ryan, min. to Mexico, Nov. 27, 1889, For. Rel. 1889, 614.

This instruction related to the case of the American schooner *Robert Ruff*, on whose master the Mexican authorities were said to have attempted to serve process when the vessel was 9 miles from land, for an offence alleged to have been committed by him on a previous voyage. It was afterwards stated that the vessel, when the process was served, was less than 3 miles from the coast. (For. Rel. 1890, 620-623, 629-631.)

The allegation in an indictment that the offence was committed "on the high seas and within the jurisdiction of this court and within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of America, in and on board of a certain American vessel, the same being then and there a schooner called and named 'Olive Pecker,' then and there belonging to a citizen or citizens of the said United States of America whose name or names is or are to the grand jurors aforesaid unknown," was held to constitute a sufficient allegation as to the locality of the offence.

*Andersen v. United States*, 170 U. S. 481, 490-493. See, as to the circumstances of this case, Mr. Cridler, Third Assist. Sec. of State, to Messrs. Peabody & Co., Oct. 16, 1897, 221 MS. Dom. Let. 514; Mr. Adee, 2nd Assist. Sec. of State, to the Attorney-General, Oct. 27, 1897, 222 MS. Dom. Let. 43.

That crimes committed on board merchant vessels on the high seas are subject to the jurisdiction of the nation to which the vessel belongs, see *United States v. Sharp*, 1 Peters C. C. 118, 121; *Cushing*, At-Gen., Sept. 6, 1856, 8 Op. 73.

The master of a British ship was held liable to conviction for false imprisonment for transporting from Chile to England certain persons whom the Chilean Government had banished and had employed him to take to England. (*Reg. v. Lesley* (1860), Bell's C. C. 220, 8 Cox C. C. 269.)

"I inclose herewith a copy of a dispatch recently received from A. C. Litchfield, esq., consul-general of the United States at Calcutta, in relation to the case of one John Anderson, an ordinary seaman on board the American bark *C. O. Whitmore*, who, it appears, stabbed and killed the first officer of the ship on the 31st of January last, while that vessel was on her way from New York to Calcutta, sixteen days from her port of departure, and on the high seas in latitude 25° 35' N. and longitude 35° 50' W.

"You will perceive that the consul-general invoked the aid of the local police authorities in securing the safe custody of the accused, who was a prisoner of the United States, until he could complete the necessary arrangements for sending him to this country for trial, against whose municipal laws only he was accused of having offended, and that while thus in the temporary custody of the local police, the colonial authorities took judicial cognizance of the matter, claiming, under the advice of the advocate-general of the colony, that, under a colonial statute, which confers upon the courts of the colony jurisdiction of crimes committed by a British subject on the high seas, even though such crimes be committed on the ship of a foreign nation, and that inasmuch as the accused, although appearing on the ship's articles under the name of John Anderson, subject of

Sweden, had declared that his real name was Alfred Hussey, and that he was a native of Liverpool and therefore a British subject, the case came within the jurisdiction of those courts.

"The matter is now believed to have reached that point in the judicial proceedings where effective measures for asserting the jurisdictional rights of the United States would be unavailable in this particular case. And whilst I entertain no doubt that the accused will receive as fair a trial in the high court of Calcutta, where it is understood he is to be tried, as he would in the circuit court of the United States, in which tribunal he would be arraigned were he sent here for trial, I deem it proper, at the same time, to instruct you to bring the question to the attention of Her Majesty's Government, in order to have it distinctly understood that this case cannot be admitted by this Government as a precedent for any similar cases that may arise in the future. No principle of public law is better understood nor more universally recognized than that merchant vessels on the high seas are under the jurisdiction of the nation to which they belong, and that as to common crimes committed on such vessels while on the high seas, the competent tribunals of the vessel's nation have *exclusive* jurisdiction of the questions of trial and punishment of any person thus accused of the commission of a crime against its municipal laws; the nationality of the accused can have no more to do with the question of jurisdiction than it would had he committed the same crime within the geographical territorial limits of the nation against whose municipal laws he offends. The merchant ship, while on the high seas, is, as the ship of war is everywhere, a part of the territory of the nation to which she belongs.

"I pass over the apparent breach of comity in the proceedings of the colonial officials as being rather the result of inadvertence and possible misconception on the part of the government law officer of the colony, than any design to question the sovereignty of the United States in this or cases of a similar nature."

Mr. Evarts, Sec. of State, to Mr. Welsh, min. to England, No. 328, July 11, 1879, For. Rel. 1879, 435. See also Mr. Evarts, Sec. of State, to Mr. Welsh, min. to England, July 29, 1879, *id.* 446.

The foregoing argument, so far as it rests on the supposition that a nation may not punish its citizen for an offence committed within the geographical limits of another nation, seems to have involved an oversight, since it is elementary that all nations assert and to a greater or less extent exercise the right to punish their citizens for acts done abroad; and while the enforcement of this right "may give rise to inconvenience and injustice in many cases, it is a matter in which no other nation has the right to interfere." (Mr. Bayard, Sec. of State, to Mr. Connery, chargé at Mexico, Nov. 1, 1887, 754, For. Rel. 1887, 754. See also For. Rel. 1887, 770, 779.)

See also Attorney-General v. Kwok-a-Sing, L. R. 5 P. C. 179.

"Her Majesty's Government have had under consideration, in communication with the government of India, the letter addressed by Mr. Welsh to my predecessor on the 29th of July, on the subject of the trial at Calcutta, in January, 1879, of one John Anderson, a British subject, on the articles of the American bark *C. O. Whitmore*, who was charged with having killed the first officer of that vessel while on the high seas. In that letter, Mr. Welsh stated that, in the opinion of the Government of the United States, the exercise of jurisdiction in that case by the high court at Calcutta was a breach of comity. He urged that 'as regards common crimes committed on board merchant vessels on the high seas, the competent tribunals of the vessel's nation have exclusive jurisdiction of the question of trial and punishment of any person thus accused of the commission of a crime against its municipal law.'

"As regards the general proposition above laid down, Her Majesty's Government are not prepared to admit that a statute conferring jurisdiction on the court of the country of the offender in the case of offenses committed by its own subjects on the high seas, on board a foreign vessel, or in places within foreign jurisdiction, would violate any principle of international law or comity.

"On the contrary, they are of opinion that there are many cases in which the conferring of such jurisdiction would subserve the purposes of justice and be quite consistent with those principles.

"Such an assumption of jurisdiction does not involve a denial of jurisdiction on the part of the state in whose territory the offense was committed; it involves no more than an assertion of a right of concurrent jurisdiction, and the most eminent authorities on international law in this country, and also in the United States, lay down that the legislative and judicial powers of a state extend to the punishment of all offenses against its municipal laws by its subjects wheresoever committed.

"But as regards the particular case of John Anderson, it appears from a report furnished by the government of India that, in the opinion of their law officers, the high court at Calcutta had jurisdiction to try the accused by virtue of the imperial act 23 and 24 Victoria, cap. 88, which extends to Her Majesty's territories in India the provisions of the act 12 and 13 Victoria, cap. 96, 'to provide for the prosecution and trial in Her Majesty's colonies of offenses committed within the jurisdiction of the admiralty.'

"The question of jurisdiction was not raised at the trial, and no decision was therefore pronounced upon it, but Her Majesty's Government are advised by the law officers of the Crown in this country that the jurisdiction of the admiralty does not extend to offenses committed on the high seas in other than British ships.

"It follows therefore from their view of the law that the high court

at Calcutta had not jurisdiction to try the case and that the trial was a nullity.

"It further appears from the report of the government of India that, after the trial, the consul-general of the United States applied for the extradition of the prisoner, and was informed that the government of India were unable to order the surrender of a person on a charge in respect of which he had been already tried and convicted by a competent British court.

"I have the honor to request that you will express to your Government the regret of Her Majesty's Government that the action of the authorities at Calcutta, in the case of John Anderson, should have been governed by a view of the law which, in the opinion of Her Majesty's Government, can not be supported, and I trust that you will convey to them the assurance that Mr. Evarts has justly attributed this incident to a misconception and not to any design to question the jurisdiction of the United States in this or any similar case."

Earl Granville, Sec. for For. Aff., to Mr. Lowell, min. to England, June 8, 1880, For. Rel. 1880, 481.

The Government of Chili has no jurisdiction over a merchant vessel of the United States on the high seas so as to enable it to proceed against that vessel or its officers, when in a Chilian port, for cruelty on the high seas to a Chilian subject on board that vessel.

Mr. Frelinghuysen, Sec. of State, to Mr. Logan, Oct. 15, 1883, MS. Inst. Chile, XVII. 113.

The courts of the United States have no jurisdiction to redress any supposed torts committed on the high seas upon the property of its citizens by a cruiser regularly commissioned by a foreign and friendly power, except where such cruiser has been fitted out in violation of its neutrality. The courts of the captors are open for redress, and an injured neutral may there obtain indemnity for a wanton or illicit capture. Nor is the jurisdiction of the neutral court enlarged by the fact that the corpus no longer continues under the control of the capturing power. The *Estrella*, 4 Wheat., 298.

2. Halleck's Int. Law, 3rd ed., by Baker, II. 173-174.

"Since our last meeting the aspect of our foreign relations has considerably changed. Our coasts have been infested

**Piracy.**

and our harbors watched by private armed vessels, some of them without commissions, some with illegal commissions, others with those of legal form, but committing piratical acts beyond the authority of their commissions. They have captured in the very entrance of our harbors, as well as on the high seas, not only the vessels of our friends coming to trade with us, but our own also. They

have carried them off under pretense of legal adjudication, but not daring to approach a court of justice, they have plundered and sunk them by the way, or in obscure places where no evidence could arise against them; maltreated the crews, and abandoned them in boats in open sea or on desert shores, without food or covering. These enormities appearing to be unreachd by any control of their sovereigns. I found it necessary to equip a force to cruise within our own seas, to arrest all vessels of these descriptions found hovering on our coast within the limits of the Gulf Stream, and to bring the offenders in for trial as pirates."

President Jefferson, annual message, 1805.

Murder or robbery committed on the high seas may be cognizable by the courts of the United States, though committed on board of a vessel not belonging to citizens of the United States, if she had no national character, but was held and possessed by pirates or persons not lawfully sailing under the flag of any foreign nation.

United States *v.* Holmes, 5 Wheaton, 412.

This rule is peculiar to the offence of piracy by law of nations, which is justiciable in the courts of any country.

Acts in foreign waters. "It is natural to consider the vessels of a nation as parts of its territory, though at sea, as the state retains its jurisdiction over them; and, according to the commonly received custom, this jurisdiction is preserved over the vessels even in parts of the sea subject to a foreign dominion. This is the doctrine of the law of nations, clearly laid down by writers of received authority, and entirely conformable, as it is supposed, with the practice of modern nations. If a murder be committed on board of an American vessel by one of the crew upon another or upon a passenger, or by a passenger on one of the crew or another passenger, while such vessel is lying in a port within the jurisdiction of a foreign state or sovereignty, the offence is cognizable and punishable by the proper court of the United States in the same manner as if such offence had been committed on board the vessel on the high seas. The law of England is supposed to be the same. It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We do not so consider or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her masters or owners, she and they must, doubtless, be answerable to the laws of the place. Nor, if her master or crew, while on board in such port, break the peace of the community by the commission of crimes, can exemption be claimed for them. But, nevertheless, the law of nations, as I have stated it,



and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or wheresoever else they may be water-borne, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself."

Mr. Webster, Sec. of State, to Lord Ashburton, British min., Aug. 1, 1842, Webster's Works, VI. 306-307, cited in *United States v. Rodgers* (1893), 150 U. S. 249, 264.

In 1868 James Anderson, a citizen of the United States, was indicted for murder committed on board a British vessel. The vessel, when the offense was committed, was 45 miles up the river Garonne, in France, in the body of the country, though within the ebb and flow of the tide. The prisoner was convicted in the central criminal court of London of manslaughter. The vessel, though flying the British flag, belonged to Yarmouth, Nova Scotia, and it was contended that as the offence was committed in France and the vessel was a colonial vessel and the prisoner an American citizen the court had no jurisdiction to try him. It was held that he was properly convicted.

*Reg. v. Anderson* (1868), 11 Cox C. C. 198. It was admitted by the judges that the French courts had a concurrent jurisdiction which they might have exercised had they claimed it.

By section 5346, Revised Statutes of the United States, it is provided that "every person who, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, on board any vessel belonging in whole or in part to the United States, or any citizen thereof, with a dangerous weapon, or with intent to perpetrate any felony, commits an assault on another shall be punished by a fine of not more than three thousand dollars and by imprisonment at hard labor not more than three years." Under this section the courts of the United States have jurisdiction to try a person for an assault, with a dangerous weapon, committed on a vessel belonging to a citizen of the United States, when such vessel is in the Detroit River, out of the jurisdiction of any particular State, and within the territorial limits of the Dominion of Canada.

*United States v. Rodgers* (1893), 150 U. S. 249, 252, 266. An indictment for murder which charges that the offence was committed on an American vessel on the high seas, within the jurisdiction of the court and within the admiralty and maritime jurisdiction of the United

States, sufficiently avers the locality of the offence. (*St. Clair v. United States* (1804), 154 U. S. 134.)

In *United States v. Rodgers*, *supra*, the court disapproved *People v. Tyler*, 7 Mich. 161. See *United States v. Willtberger*, 5 Wheat. 76; *Thomas v. Lane*, 2 Summ. 1; *United States v. Coombs*, 12 Pet. 72.

A defendant was indicted in the circuit court of the United States at Philadelphia for murder. It appeared that he was mate of the American brig *Rover*; that while the brig lay at Cape François he dealt the master a blow with a piece of wood, and that the master, being taken on shore, died there the next day. It was contended that in order to give the court jurisdiction under the eighth section of the crimes act both the death and the blow must occur on the high seas.

Peters, J., said that both the stroke and the consequent death must happen on the high seas.

Mr. Justice Washington took the same view.

*United States v. McGill* (1806), 4 Dallas, 426.

Where a gun was fired from an American ship lying in a harbor of one of the Society Islands, killing a person on board a schooner belonging to the natives in the harbor, it was held by Judge Story that the act was, in contemplation of law, committed on board the foreign schooner where the shot took effect, and that jurisdiction of the offense belonged to the foreign government and not to the courts of the United States. Where a prisoner under such circumstances was sent home for trial, it was held that the court had no jurisdiction.

*United States v. Davis*, 2 Sumner, 482.

**Civil liabilities on American vessels.** An action for damages was brought for the negligent killing of a person on a vessel hailing from and registered in a port of the State of New York and owned by citizens thereof. The action was brought in a court of the State of New York, and in order to maintain it it was necessary to show that the statute of the State, by which such a right of action was given, was operative on board the vessel on the high seas. It was admitted that, if the question had arisen under the laws of the United States, the principle that a ship on the high seas is constructively a part of the territory of the nation to which she belongs would be applicable; but it was denied that the State of New York could be regarded as a sovereignty whose laws followed her till she came within the jurisdiction of another government. The court said that, in respect of crimes committed on the high seas, the power to provide for their punishment had been delegated to the Federal Government, so that State laws could not be applicable to them; but.

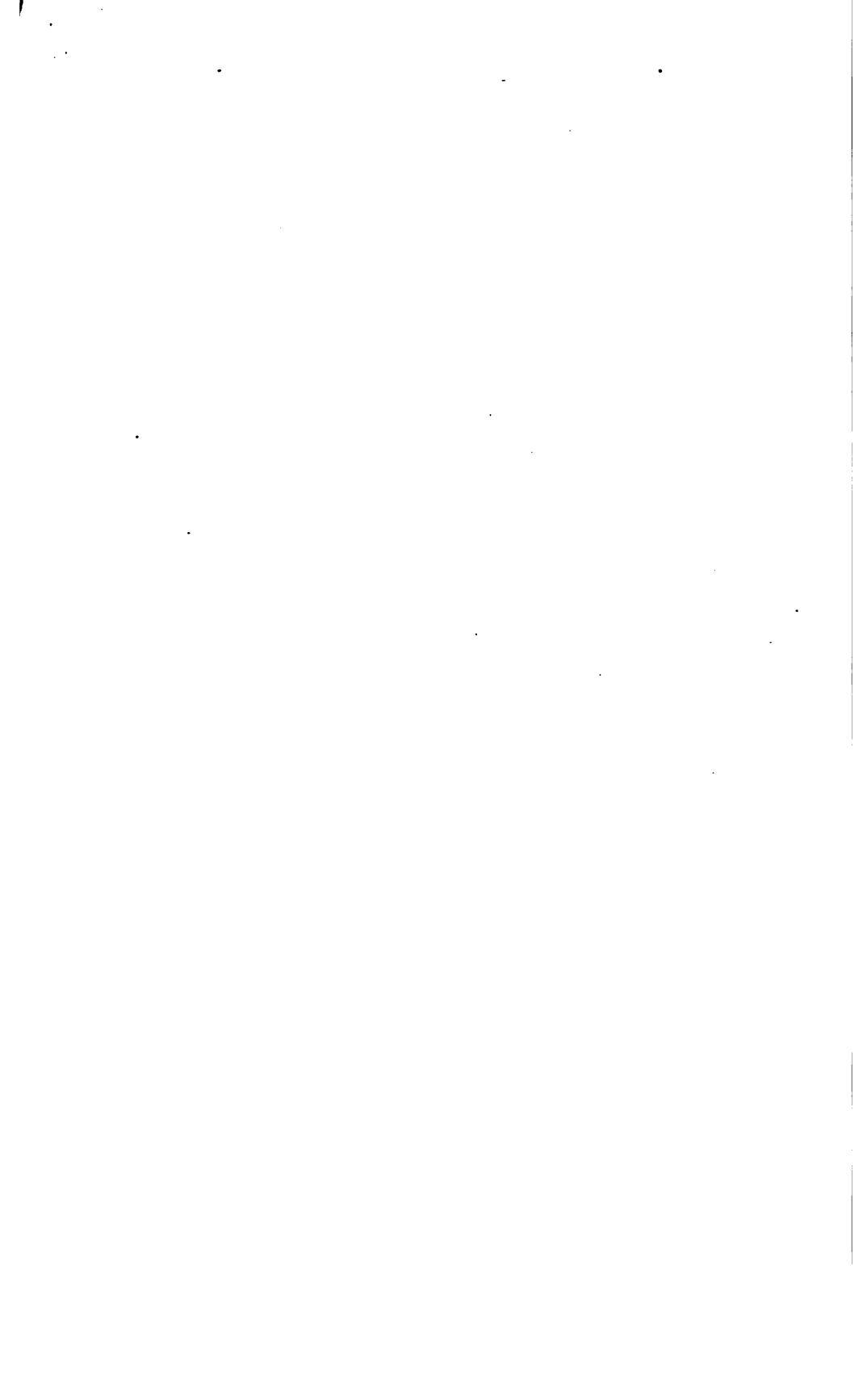
On the strength of *Crapo v. Kelly*, 16 Wall. 610, the court held that "civil rights of action for matters occurring at sea on board of a vessel belonging to one of the States of the Union must depend upon the laws of that State, unless they arise out of some matter over which jurisdiction has been vested in and exercised by the Government of the United States, or over which the State has transferred its rights of sovereignty to the United States; and that to this extent the vessel must be regarded as part of the territory of the State, while in respect to her relations with foreign governments, crimes committed on board of her, and all other matters over which jurisdiction is vested in the Federal Government, she must be regarded as part of the territory of the United States and subject to the laws thereof. . . . The jurisdiction of the States and of the United States in the matter of personal torts committed at sea . . . are concurrent, though remedies by proceedings *in rem* can be administered only by the courts of admiralty of the United States. The field of legislation in respect to cases like the present one has not been occupied by the General Government and is therefore open to the States."

*McDonald v. Mallory* (1879), 77 N. Y. 546. See 1 Beale's Cases on the Conflict of Laws, 51.

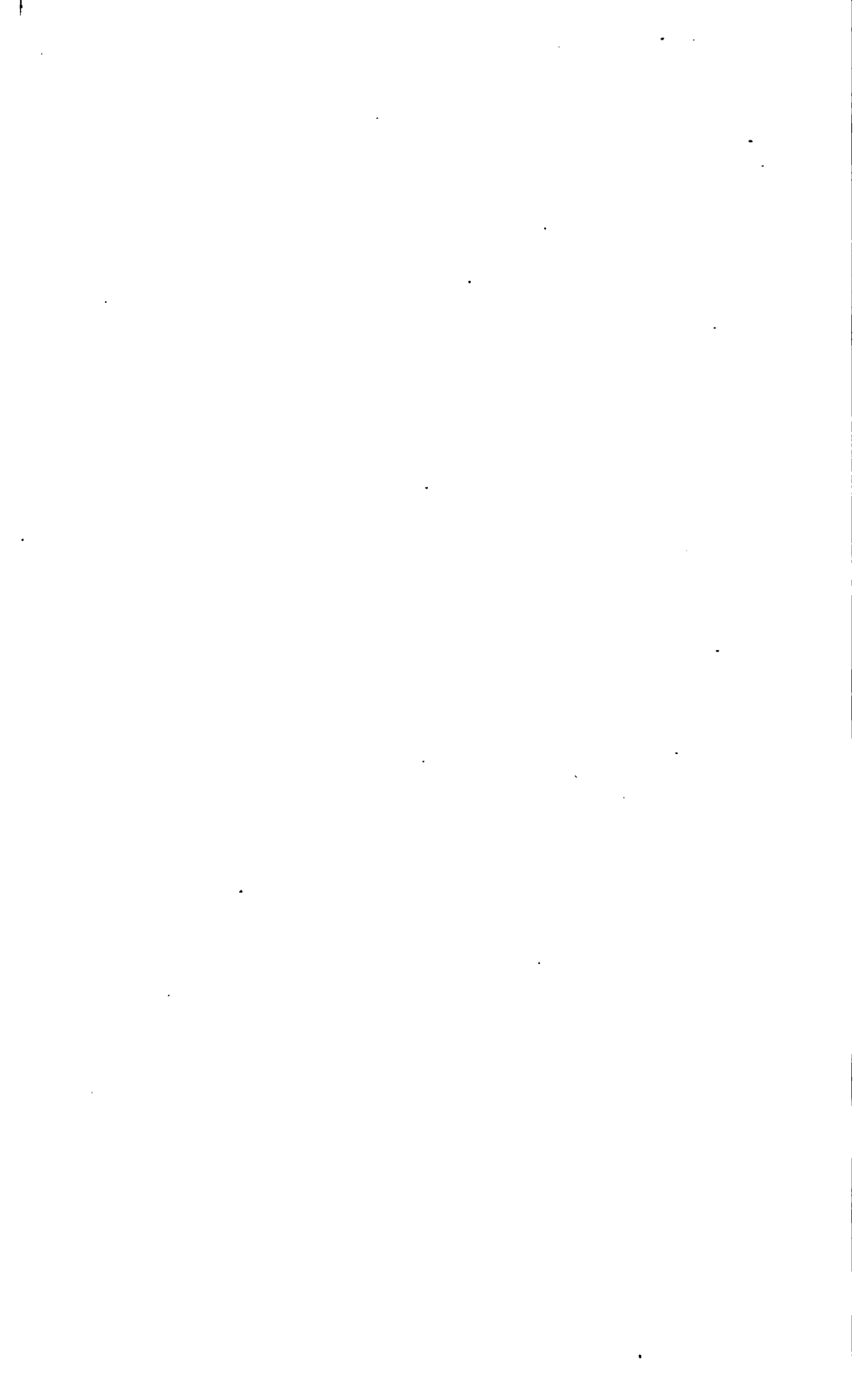
In the case of *Kelly v. Crapo*, 16 Wall. 610, reversing *Kelly v. Crapo*, 45 N. Y. 86, a citizen of Massachusetts owning a ship which was registered in Massachusetts, but which was at the time on the high seas, was adjudged insolvent in that State and all his property was judicially transferred to an assignee in insolvency. It was held that the ship therefore could not be attached in New York in a suit subsequently brought against the insolvent by a New York creditor. See Dicey on the Conflict of Laws, Moore's American Notes, 357.

By sec. 5576, R. S., "all acts done, and offenses or crimes committed," on a guano island appertaining to the United States, or in the waters adjacent thereto, are "deemed committed on the high seas, on board a merchant-ship or vessel belonging to the United States," and are punishable "according to the laws of the United States relating to such ships or vessels and offences on the high seas." The offense may be tried, under sec. 730, R. S., in the "district where the offender is found, or into which he is first brought."

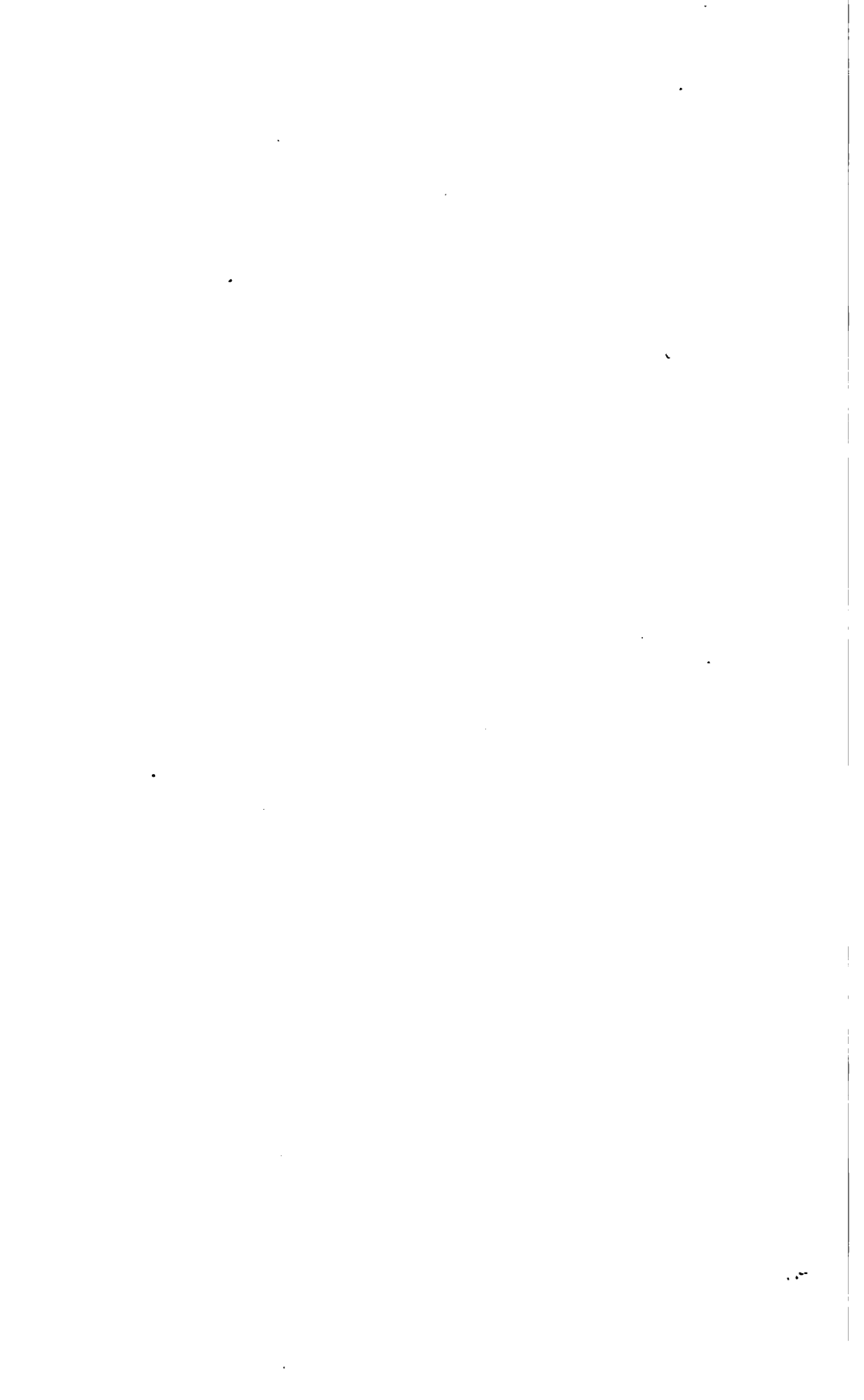
*Jones v. United States*, 137 U. S. 202, 11 S. Ct. 80; *Smith v. United States*, 137 U. S. 224, 11 S. Ct. 88; *Key v. United States*, *ibid.*





















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